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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 858

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM SUPREME COURT OF ILLINOIS. NO. 27768

JURISDICTIONAL STATEMENT OF APPELLANT

The appellant, Illinois Commerce Commission, presents this jurisdictional statement in accordance with the provisions of Rule 12 of the Rules of this Court.

Statement That the Instant Case Is One of Five Companion Cases

The instant case is one of five companion cases,* all of which present one question which is identical in all of the cases and further questions which are not identical but which are similar in all cases. These five cases, including the instant case, are identified by their title and number in the

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* (Clerk's Note—The jurisdictional statements in the companion cases Nos. 859-862, are identical with this statement and are not printed.)

Supreme Court of the State of Illinois in the margin.[1] The jurisdictional statements in all five cases are identical since the variations in the evidence in the cases do not affect jurisdictional questions.

Reference to the Federal Statutory Provision Believed to Sustain This Court's Jurisdiction On Direct Appeal

As more fully appears from the suggestions hereafter set forth in this statement, jurisdiction by direct appeal to this Court, as distinct from jurisdiction to grant a writ of certiorari, is believed to be sustained by Section 237 of the Federal Judicial Code (U. S. Code Ann., Title 28, Section 344). More particularly it is contended that, in the language of the section above cited, this case is one in which "is drawn, in question the validity of a statute of" the State of Illinois "on the ground of its being repugnant to the Constitution, * * * or laws of the United States, and the decision is in favor of its validity, * * *."

Reference to the Statute of Illinois, the Validity of Which Is Involved

As more fully appears from the suggestions appearing later in this statement, the first question which will be presented, if this appeal is allowed, which question is identical in all of the five companion cases, is whether the Illinois Public Utilities Act, as construed by the Supreme Court of the State of Illinois in this case and as applied on such construction to the facts in this case, is, to the extent only

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[1] *Illinois Central Railroad Co.* v. *Illinois Commerce Commission*, No. 27768; *Fleming et al., Trustees of Chicago, Rock Island and Pacific Railroad Co.*, v. *Illinois Commerce Commission*, No. 27894; *Chicago, Burlington and Quincy Railroad Co.* v. *Illinois Commerce Commission*, No. 27895; *Scandrett et al.* v. *Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *Illinois Commerce Commission*, No. 27896; *Sprague et al., Trustees of Chicago, North Shore and Milwaukee Railroad Co.* v. *Illinois Commerce Commission*, No. 27898.

that it has been so construed and applied, in conflict with the provisions of the Emergency Price Control Act of the United States Congress, and therefore insubordinate to Paragraph 2, Article VI of the Constitution of the United States which provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; • • • shall be the Supreme Law of the Land; • • •." The official citation of the Illinois Public Utilities Act, Chap. 111⅔, Paragraphs 1-95, both inclusive, of the Illinois Revised Statutes for 1943 (page 2498) (the original text of this Act will be found in Illinois Session Laws for 1921 at page 702, *et seq.*).

The Illinois Public Utility Act is the Act creating the Illinois Commerce Commission and bestowing upon that Commission its powers. The Act authorizes the Commission, among other things, to approve increases in rates.

The provisions of the Emergency Price Control Act with which it is contended that the construction and application of the Illinois Public Utilities Act in the present case conflict is Public Law No. 729, 2nd Section, entitled, "An Act to amend the Emergency Price Control Act of 1942, to aid in the preventing inflation, and for other purposes," and particularly that proviso thereof hereafter discussed.

Reference to the Title of the Judgment Sought to Be Reviewed and the Date Upon Which the Application for Appeal Is Presented.

The judgment in the case of *Illinois Central Railroad Company* v. *Illinois Commerce Commission* in the Illinois Supreme Court, No. 27768, was rendered on May 16, 1944, but rehearing was not denied until September 18, 1944. The judgments in the other four cases were rendered on Sep-

tember 19, 1944. No petition for rehearing was filed in these latter cases.

Application for appeal to the Supreme Court of the United States is presented to the Supreme Court of Illinois on September 29, 1944, within ninety days after the petition for rehearing was denied in the *Illinois Central* case, and within ninety days after the rendition of final judgment in the other four cases.

The Nature of the Cases and the Rulings of the Court Which Were Such as to Bring the Cases Within the Jurisdictional Provisions Relied Upon.

In each of the five cases a railroad company or its trustees in bankruptcy filed with the Illinois Commerce Commission a schedule of proposed increased rates, fares and charges for intrastate suburban commutation fares, such schedules being in each case filed prior to the effective date to the amendment of the Emergency Price Control Act cited above and relied on in the respect hereafter set forth. The fares sought to be increased were intrastate commutation fares.

The amendment last mentioned contained the following provision:

> "• • • *Provided*, that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

In each case, evidence was submitted to the Commission in an effort to support the application for increased fares and the record was closed before September 15, 1942.

The Commission had not announced its decision or entered its order on September 15, 1942; and, even if an order had been entered, specific provisions of the Illinois Public Utilities Act empowered the Commission to vacate or modify its order on petition for rehearing or modification. (Illinois Public Utilities Act, Section 67, Illinois Revised Statutes 1943, Ch. 111 ⅔, Par. 71.)

Under date of October 14, 1942, James F. Byrnes, Director of Economic Stabilization, issued his Directive No. 1, by which he designated the Price Administrator of the Office of Price Administration as his representative to receive notices of increases in common carrier or other public utility rates and charges.

On November 12, 1942, the Office of Price Administration issued Procedural Regulation No. 11, which is set forth as Appendix I.

Notwithstanding the fact that the applications for increased rates were pending before the Commission at the time that the Act in question was passed, and at the time the directive and regulation referred to above were promulgated, none of the railroads (or their trustees) made it appear of record that they had notified the Price Administrator of their intent to put into effect any general increase in rates or charges, and that they consented to his timely intervention before the Illinois Commerce Commission.

In each of the cases the Illinois Commerce Commission construed the amendment to the Emergency Price Control Act as having such force, notwithstanding any law of the State of Illinois, as to make the Price Administrator in effect an indispensable party, at least to the extent that he must be notified, and given an opportunity to request, without opposition from the railroad, a chance to be heard in any proceeding contemplating an increase in intrastate public utilities rates.

Even if it should be held that the Commission was not *required* to forbear action until notice had been given, it is still contended that the Commission had a *right* to insist that we be notified. It is further contended that this right is of Federal origin, that it derives from the congressional exercise of war power, and that to construe the Illinois Public Utility law as imposing duties on the Commission at variance with this Federal right is to bring Illinois statutory law into conflict with the statutes and the Constitution of the United States.

The Commission also raises a question, deemed very substantial and highly important, as to whether the presently standing opinions, which forbid the Commission to scrutinize the entire operations of the companies, in effect command the Commission to fix rates without adequate evidence so as to deprive the patrons of their property without due process of law. The basis for this question will be indicated under that section of this statement devoted to showing that the Federal questions involved are substantial.

Specifications to the Stage of the Proceedings and the Manner in Which the Federal Questions Sought to Be Reversed Were Raised.

The Commission's assertion that it had no jurisdiction to grant the increase in rates involved in these proceedings was sought further in each case, respectively, in the Commission's final order.

In Illinois, the practice upon which is known as a "statutory appeal" to the circuit court or superior court does not contemplate the filing of written pleadings. The Commission's order and the record of the proceedings upon which such order was entered constitute the record upon which the case is heard in the trial court. At the time that this jurisdictional statement is being prepared, the record

has not been compiled and it is impossible to cite record pages. But the final order in each case is reproduced in an abstract of record in each case, which abstracts will be incorporated in the record on this appeal.

Since the Commission denied the increase here sought upon jurisdictional grounds and also upon its findings that the cases made by the carriers, respectively, did not entitle them to the increase, it was not necessary for the Commission, as a further and additional ground for such denial, to advert to the claim that to grant the increase would be to violate the due process clause. But in Illinois, the rule is well settled that an administrative order may be entered upon one ground and sustained upon any ground which will support it, even though such ground was not only ignored but may even be inconsistent with the ground assigned. (See *Clausen* v. *Department of Finance*, 377 Ill. 399, where the Supreme Court sustained an order imposing the Illinois Retailers' Occupation Tax upon a theory admittedly overlooked and suggested by the Department for the first time on appeal.)

In Illinois, assignments of error in the formal sense of the term are no longer used. However, Rule 39 of the rules of practice of the Supreme Court of Illinois requires that "the concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal or of the cross errors submitted by an appellee not prosecuting a cross appeal." The same rule also requires that "the Statement of the case shall be followed by the propositions of law and the authorities relied upon to support them."

In each case, the Commission raised and argued both Federal constitutional questions in its briefs.

We particularly call this Court's attention to the fact that the Supreme Court of Illinois discussed appellant's

contentions, passing upon and rejecting them. It is therefore clear that the Supreme Court of Illinois in effect held that the questions were properly before it.

Showing That the Questions Involved Are Substantial

I

The question as to the effect of the emergency Price Control Act upon the jurisdiction of the Illinois Commission under the Illinois Public Utilities Act, is substantial.

The Supreme Court of Illinois, acceding to the contentions of the carriers and rejecting the contrary contentions of the Commission, has squarely held that "the failure to give such notice" (that is, the notice required by the Emergency Price Control Act and the regulations implementing it) "would not, in any event, affect the jurisdiction or power of the Commission or alter its duties in a matter of this kind."

The question whether the court was justified, not only in this holding that the Price Administrator had no right to intervene, but in holding further that *the Illinois Commission was not entitled, by Federal legislation, to insist that he be given an opportunity to request leave to intervene*, and was not entitled to hear, consider and, if it thought proper, act upon his showing and suggestions, is substantial. The considerations militating against the view expressed by the Supreme Court of Illinois may briefly be summarized as follows:

As this Court has perceived and expressly stated, although the Emergency Price Control legislation has directly and immediately applied the war power of Congress to virtually every commodity and service except the services rendered and commodities purveyed by public utilities, the Congress has forborne the immediate regulations, by

such emergency instrumentalities as the Office of Price Administration, of the rates of public utilities and has left the regulation of such rates to Federal and State Commissions in express contemplation thereon that such Federal and State Commissions can effectuate in full the Congressional policies (of stabilized prices) when such Commission has had the benefit of evidence, information and argument submitted by the Office of Price Administration.

In other words, Congress has granted a concession to public utilities—an exemption from the drastic and stringent regulation which has been imposed upon the prices of every other article and service in the country—upon the condition that, instead of obtaining the *direct approval and sanction* of the Office of Price Administration, as must every merchant in the country, such utility shall inform the Office of its intention to raise its rates and upon the further condition that the utility afford the Office, as the representative of the consuming public, of a nation at war, the opportunity to advise, by proof and argument, a State regulatory commission.

This is obviously a command—or at the very least, congressional authority—to every Federal and State commission to insist upon and receive the benefit of this representation of the public's interest in hearings conducted before it.

Is it not, then, clearly untenable to say that a State Commission not only has no duty but has not even the right to require the utilities to obey an act which, instead of preempting control of utilities' rates from the Commission, leaves such control with the Commission only upon the terms and conditions set forth in the act?

The logic and *rationale* of the Congressional policy seems clear to us. Congress was evidently of the view that State and Federal Commissions could better effectuate the stabilization policy than could the Office of Price Administra-

tion *provided that such State and Federal Commissions at least had access to the showing and argument of that agency primarily charged with perceiving the Nation's economy so far as possible, in time of war.*

In the Illinois Supreme Court, the Commission contended that the Illinois Public Utilities Act, which creates the Illinois Commission and from which the Illinois Commission derives not only its existence but all of its powers, should be construed as contemplating that, in the event of the exercise of Federal power enjoining duties or even merely conferring rights on the Commission, the Commission should be subject to those duties and entitled to those rights. The Supreme Court of Illinois, by declaring that "the failure to give such notice would not, in any event, effect the jurisdiction or powers of the Commission," has squarely held that the Illinois act does not contemplate that the Commission must or *even may, in its discretion,* insist that it will not grant an increase in prices which may be inconsistent with Federal policies until it has heard the spokesman for the Federal Government concerning that policy. In each of these cases, the Price Administrator asked leave to intervene in the Supreme Court of Illinois as *amicus curiae.* In each of these cases the Supreme Court of Illinois denied this leave.

This Court will not be required to decide in this case whether, had the notice been given and had the Director of Economic Stabilization sought leave to intervene, the Commission might have refused such leave. This is a case in which the Commission, acting in what it conceives to be obedience to congressional exercise of the war power and in what it conceives to be conformity with the Nation's military policy as articulated by Congress, refused to grant the price increases here sought without the benefit of the Federal Government's representations and arguments.

In short, we contend that the very least that can be conceded to the Commission under the congressional measures pertinent here is that the Commission had a right, conferred by Congress, to act, if it saw fit, in accordance with national military policy. The Commission asserted and claimed that right in its order. The right has been denied by the decisions of the Supreme Court of Illinois now under review.

Whether that right was properly or improperly denied presents a substantial and important Federal question.

II

The question whether the Illinois Supreme Court's decisions deprives the carrier's passengers of property without due process of law is substantial.

For many years carriers have had access to this Court upon the assertion of the contention, when there was reasonable basis in the record to sustain the contention, that a Federal or State Commission has confiscated their property without due process of law when an order has been entered with the sufficient evidence in the record, to support the denial of an increase or the command of a decrease in the carrier's tariffs. In this case, we seek to present, for the first time, so far as we are aware, the precise converse of that contention, namely, the contention that where the carriers fail to present substantial evidence justifying an increase, to set at naught an order denying such an increase, is to impose upon the carrier's patrons a confiscatory high rate.

We do not deem it appropriate to inflict upon this Court, under the guise of a suggestion of a substantiality of a Federal question, an exhaustive brief upon the merits of the question. We regard it as sufficient briefly to indicate the following considerations which were opposed to the

holding of the Supreme Court of Illinois and which we believe to be substantial.

In the earnest view of the Commission, the carriers imposed upon the Supreme Court of Illinois a sophistical reading of this Court's decision in *Northern Pacific Railway Co.* v. *North Dakota,* 236 U. S. 586. In that case, this Court held (and we do not challenge the holding) merely that a carrier may not be required to render one type of service at a loss because it is earning a fair or even an exclusive rate upon other types of service. In other words, to permit one class of traffic to move at less than a compensatory rate is virtually to make a gift of the Company's property to that class of traffic at the expense of other classes of traffic which move at a fair or perhaps an exorbitant rate.

The Commission does not challenge the holding of this case. It does, however, contend that nothing in that case is inconsistent with the position insisted upon here. That position is that the Commission could not determine whether the carriers were in fact sustaining a loss upon their commutation service without a perspective of the entire operations and fiscal economy of the companies. This position is briefly indicated later in these suggestions.

For these reasons, the Commission contends that the opinions of the Supreme Court of Illinois will, unless reversed, impose upon Illinois citizens, as upon transits so journeying in Illinois, rates of fare which have been demanded by the carriers without the showing requisite to due process of law.

All of the cases, though separately filed and docketed, were prosecuted upon substantially a similar theory although, of course, the evidence in each case was different, and it is evident that these carriers, as well as other carriers whose cases are not before this Court, sought the increases here in question as a concerted move. Hence the following

general observations are applicable to all of the five cases herein involved:

There was a fundamental and profound divergence before the carriers, on the one hand, and the Commission, on the other hand, upon a basic question, which question is regarded by the Commission as embodying an issue of Federal constitutional law. This question may be delineated as follows:

The carriers took the view that, because of their interpretation of this Court's teachings in *Northern Pacific Railway Company* v. *Department of Public Works of the State of Washington,* 268 U. S. 39, and similar cases, they were not bound to submit to the Commission a showing of their over-all earnings from (a) interstate freight; (b) intrastate freight; (c) interstate passenger service, whether suburban or non-suburban, whether commutation or non-commutation, or (d) other sources of revenue. It was the position of the carriers, which position was sustained by the Supreme Court of the State of Illinois, that, this Court having held in the Northern Pacific case that a carrier is not bound to render one type of service at a loss even though it makes a fair or even an exorbitant sum on other type of services, the Commission was not entitled even to scrutinize earnings from other sources.

Both the carriers and the Supreme Court of Illinois appear to have misunderstood the view of the Commission, which is *not* that a rate which is *in fact* confiscatory may be imposed upon a carrier with respect to one type of service merely because it is making a fair return or may be making an excessive rate upon other types of service. The Commission did and does contend, however, that, particularly in view of this Court's decisions in *Federal Power Commission* v. *Natural Gas Pipeline Company,* 315 U. S. 575, and *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U. S.

591, the Commission, in order to prevent the confiscation of the public's money, was not only entitled but was bound and required to view the carriers' operations of suburban commutation service against the perspective of the carriers' entire economy and fiscal policy. This inquiry was proper and necessary, not to inflict a low rate as to one class of service because of high rates as to other classes of services, but because the carriers' claim that present rates are confiscatory necessarily depended upon segregation, allocations and apportionments both with respect to invested capital and operating expenses, including, of course, the very important items of depreciation and retirements, upon a view of the entirety and totality of the carriers' operations.

The Commission conceives it to be its duty to the public, enjoined upon it by a proper reading of the Constitution of the United States, to prevent unjust discriminations between the various classes of service. Even if it should be granted (for the sake of argument only, of course) that a carrier was suffering a confiscatory loss with respect to one type only of its service, it would have no right to have that loss remedied if other types of service, such as, for instance suburban *non-commutation service* (that is single fare as distinct from multiple ride), were not subject to a corresponding revision downward. Indeed it might even be conceivable that by suffering a loss not only upon its suburban but upon some type of non-suburban service which loss would be reflected in the apportioned charges against capital and operating expenses, the total loss should be compensated by only a partial granting of the increase sought in the case of commutation service, and some revision upward of rates on some other branch of the service.

Furthermore, it was and is an important contention of the Commission that, although the carriers computed their loss by deducting from commutation revenue sums representing apportioned charges against capital and oper-

ating income, the Commission could not determine the propriety either of the total charge or of an apportionment assigned to commutation fares without having before it the entire panorama of the carriers' system and operations.

It has consistently been, and in this case will be, the position of the Commission that to visit upon the public an increase in tariff when such increase must necessarily be predicated upon a finding of apportionment of expenses and charges when the basis for that apportionment has not been presented to the Commission, would be for the Commission to make findings favorable to the carriers and adverse to the public without evidence and in violation of the due process clause of the Constitution.

But we do contend that when a Commission, in order to assure that a carrier's costs of operation and charges against capital shall be reasonably fairly distributed among all classes of traffic, holds, in effect, that it cannot in fairness to the public raise the rates for one class of traffic (in this case, intra-state commutation suburban traffic) by an amount arbitrarily fixed by the carriers at ten per cent without the *data* for a complete survey of the company's operations, a reversal by a State Supreme Court of such a holding has in substance denied the public that opportunity to have its interests considered which is the essence of due process of law.

It is obvious that such items as pertain to rights of way, through traffic stations, which also serve suburban traffic, general corporate taxes, real estate taxes, charges for the company's general personnel and many other items must be apportioned between commutation and other service if the public interest is to be fairly consulted. The presently standing opinions of the Supreme Court hold that the company's segregations and apportions were adequate. We submit that so to hold when the company's general opera-

tions were not before the Commission is in effect to command the Commission to make *fiat* holdings.

It is evident from a reading of the presently standing opinions that the Supreme Court of Illinois believed that it was following the dictation of this Court in the Northern Pacific case and similar authorities. We earnestly urge that the conflict between the view expressed in the presently standing opinions and the view indicated in these suggestions raises a substantial Federal question.

III

The Supreme Court of Illinois has decided a Federal question in a way properly in conflict with this Court's decisions.

As long as the Supreme Court of Illinois adheres to the view that the Commission could not deny an increase to the carriers on the present record because of that court's reading of this Court's decision in *Northern Pacific Railway Co.* v. *North Dakota*, already cited, 236 U. S. 586, it cannot affirm the orders of the Commission involved here. In other words, the Supreme Court's opinion holds squarely that, under Federal constitutional law, the carriers are entitled to the increase here sought.

We believe that the Supreme Court of Illinois has failed to give proper effect to this Court's teachings in its recent decisions in *Federal Power Commission* v. *Natural Gas Co.*, 315 U. S. 575 and *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591. Those cases held, contrary to the decisions of the Supreme Court of Illinois, that a formula which has regard for the impact of the order does not deprive public utilities of their property without due process of law. We have already suggested the application of these cases to the instant case. We repeat our advertence to these cases under the present points simply to em-

phasize that, logically, the Federal question whether the Supreme Court of Illinois denied the public due process of law is distinct from the further Federal question as to whether the Supreme Court of Illinois has rightly interpreted this Court's opinion in the *Northern Pacific* case in the light of this Court's recent expositions of the appropriate constitutional doctrines.

We submit that this later question, namely, the question of the applicability of the Northern Pacific doctrine is a substantial Federal question.

Conclusion

For the reasons urged in these suggestions it is submitted that this Court has jurisdiction of these appeals and that substantial Federal questions are presented.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellants.

APPENDIX "1"

"Sec. 1300.901 *Definition.* For the purpose of this Procedural Regulation No. 11, a general increase in the rates or charges of a common carrier or other public utility is defined as any change in its rates, fares, classifications, rules, regulations or practices which results in an increase in the charges for transportation or other public utility service applicable to a class of passengers, shippers or customers, including increases in wholesale or industrial rates or charges for public utility services, as distinguished from an increase of rates or charges applicable to a particular customer or transportation service under special arrangement.

"Sec. 1300.902. *General requirements with respect to notices.* Thirty (30) days before the effective date of a general increase in the rates or charges of any common carrier or other public utility, there shall be filed with the Transportation and Public Utilities Division of the Office of Price Administration, Washington, D. C., two copies of notice of such proposed increase, except as otherwise provided in paragraphs (d) and (e) of Sec. 1300.904. Such notices shall be deemed to have been filed when received in the Office of such Division. If authority for the establishment of any such increase is required by any regulatory agency, notice shall be given on or before the time such authority is sought in order that the Price Administrator may have timely opportunity to intervene, but in no event shall such notice be given less than 30 days before such proposed increased rates or charges are to become effective. All notices shall state the name and address of the Federal, State or municipal authority having jurisdiction over the rates or charges in question.

"Each such notice shall contain a statement that the common carrier or other public utility consents to the timely intervention by the Price Administrator, on behalf of the Director of Economic Stabilization, before

the Federal, State or municipal authority having jurisdiction to consider such increase.

"One copy of each notice must be over the signature of an executive officer, a responsible traffic officer, or a duly authorized attorney or agent of the carrier or other public utility. Duly authorized officers of corporate agents shall sign on behalf of such agents. The person signing the notice shall certify that the information contained therein is true to the best of his knowledge, information and belief."

APPENDIX "2"

Docket Nos. 27894-8, Cons.—Agenda 23—May, 1944

Joseph B. Fleming *et al.*, Trustees of the Chicaga, Rock Island and Pacific Railway Company, Appellants, v. Illinois Commerce Commission, Appellee.—Chicago, Burlington & Quincy Railroad Company, Appellant, v. Same Appellee.—Henry A. Scandrett *et al.*, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellants, v. Same Appellee.—Chicago and Western Indiana Railroad Company, Appellant v. Same Appellee.—A. A. Sprague *et al.*, Receivers of Chicago North Shore and Milwaukee Railroad Company, Appellants, v. Same Appellee.

Mr. Justice Smith delivered the opinion of the court:

In this cause five cases have been consolidated for decision and opinion. The cases consolidated are No. 27894, Fleming *et al.*, Trustees of The Chicago, Rock Island and Pacific Railway Co. v. Illinois Commerce Commission; No. 27895, Chicago, Burlington & Quincy Railroad Co. v. Same; No. 27896, Scandrett *et al.*, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. Same; No. 27897, Chicago and Western Indiana Railroad Co. v. Same; No. 27898, Sprague *et al.*, Receivers of Chicago North Shore and Milwaukee Railroad Co. v. Same. Each of the cases is an appeal under section 69 of the Public

Utilities Act (Ill. Rev. Stat. 1943, chap. 111⅔, par. 73,) from an order of the circuit court of Cook county, affirming an order of the Commerce Commission.

Following the granting by the Interstate Commerce Commission of an increase of 10 per cent in through passenger rates generally, and in one-way and round-trip suburban rates in the Chicago suburban area, each of the appellants filed with the Illinois Commerce Commission tariffs proposing a like increase in commutation or multiple-ride ticket rates in its suburban service in the Chicago area. The rates proposed by the tariffs were to become effective on March 8, 1942. The commission, however, entered an order in each case suspending the proposed rates and set the case for hearing. Hearings were had. The hearings were concluded in May, 1942, and the cases were taken by the commission for decision. The final order and decision of the commission was filed in the first three cases on November 24, 1942, and in the other two cases on December 9 and December 22, 1942, respectively. By these orders the commission denied the proposed increase in rates and permanently suspended the tariffs filed. Separate appeals from these orders were duly and timely perfected to the circuit court of Cook county. Upon a hearing the circuit court affirmed the order of the commission in each case.

It is here contended by appellants that the orders of the commission should be reversed and set aside for the reason that such orders do not contain sufficient and essential findings of fact; that they are based upon speculation and conjecture and contain erroneous conclusions and recitals; that said orders are unreasonable and unlawful; that the commission disregarded the evidence and considered matters wholly outside the record and which were not in evidence.

Before considering the other questions involved it will be necessary to dispose of appellee's contention that the commission could not approve the proposed rates because of the alleged failure of appellants to comply with the pertinent provisions of the 1942 amendment to the Emergency Price Control Act. (50 U. S. C. A. appendix 961.) That amendment provides: "*Provided*, That no common

carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

As already noted, the hearings in these cases were concluded in May, 1942. The cases were then taken by the commission for decision. The above amendment to the Emergency Price Control Act was not passed until October 2, following the submission of the cases. In some of the cases the records show that after the orders of the commission were entered, and while the cases were still pending before the commission, notice was given in accordance with that act. There was no appearance by the Director of Economic Stabilization or the Price Administrator of the Office of Price Administration, either before the commission or in the circuit court. The failure to give such notice did not affect the jurisdiction or powers of the commission, nor in any way change or enlarge the issues. That act only gives to the Director of Economic Stabilization the right to intervene and be heard. It in nowise, affected the jurisdiction of the commission. *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, 64 S. Ct. 731, is decisive on this question. It was there said: "The Emergency Price Control Act of 1942, while it gives the Administrator power over prices of 'commodities,' which are not generally regulated by public authority, specifically and expressly withholds from the Administrator jurisdiction over public utility rates. And, as we have noted, the Stabilization Act of October 2, 1942, did not alter this prohibition but required merely that no utility should generally increase rates in effect September 15, 1942, unless it first gave thirty days' notice to the President or his representative and consented to the timely intervention of that representative before the federal, state, or municipal authority having jurisdiction to consider the increase. It is not clear that this language confers a right of intervention. The bill as passed by the Senate contained a provision that there should be no increase in utility rates unless they were approved by the

President. The House refused to concur, with the result that only the language now contained in the proviso appeared in the bill. The assertion that, while the Price Administrator or the Director may present his views to the regulatory body 'he had nothing to say about its decision,' was made and not contradicted on the senate floor in discussion of the conference report. Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation, but in both the original Act and the amendment, as this Court has recently said in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 64 S. Ct. 474, 480, was careful 'to avoid paralyzing or extinguishing local institutions.' Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises. * * * We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra,* as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers. This we are unable to do."

The failure to give such notice would not, in any event, affect the jurisdiction or powers of the commission or alter its duties in a matter of this kind. The contention of appellee on this branch of the case cannot be sustained.

Four of the cases, *viz.:* Nos. 27894, 27895, 27896 and 27898, involved common questions and may be considered together. A brief reference to the character of the suburban service rendered by appellants in those cases will not be inappropriate. The record in cause No. 27894, Fleming *et al.,* Trustees of The Chicago, Rock Island and Pacific Railroad Co. v. Illinois Commerce Commission (hereinafter referred to as the Rock Island case,) shows that the Rock Island operates suburban service over its main line from Chicago to Joliet, a distance of 40.2 miles. The Chicago terminus is LaSalle Street Station, which is used jointly with the New York Central. That station and also the tracks and other facilities between that station and Joliet

are used by both through and suburban trains. Commutation and other suburban passengers are carried on both. It also operates a suburban line which branches off from the main line at Gresham, Eighty-ninth street, Chicago, and extends westerly and southerly to Blue Island, where it again connects with the main line. The length of the suburban line is 6.7 miles. The tracks and other facilities of this suburban line are used exclusively in the suburban service.

In No. 27895, Chicago, Burlington & Quincy Railroad Co. v. Illinois Commerce Commission (hereinafter referred to as the Burlington case,) the record shows that the railroad company operates suburban service between Chicago and Aurora, and intermediate stations, a distance of 38 miles. The Chicago terminus is the Union Station. The suburban service is operated over its main line. Commutation and other suburban passengers are carried on both suburban and through trains.

In No. 27896, Scandrett *et al.*, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. Illinois Commerce Commission, (hereinafter referred to as the Milwaukee case,) the record shows that the suburban service is operated over two lines of railroad. One of these lines extends from Union Station in Chicago to Elgin, a distance of 36.6 miles, while the other extends from Union Station to Walworth, Wisconsin, a distance of 73.2 miles. The tracks and other facilities used by it in its suburban service are also used in the transportation of through freight and passengers.

In No. 27898, Sprague *et al.*, Receivers of Chicago North Shore and Milwaukee Railroad Co. v. Illinois Commerce Commission, (hereinafter referred to as the North Shore case,) the railroad operates suburban service between Chicago and Waukegan and Chicago and Mundelein, and intermediate stations. Most of its suburban service is conducted over what is known as the Shore Line, extending from the Chicago Loop District, north to Waukegan. It also operates suburban trains over what is designated as the Skokie Line. This line branches off the Shore Line at Howard street and runs north to Milwaukee, Wisconsin. At Lake Bluff it connects with a line extending westerly

to Mundelein. Through passenger and freight business is also conducted over the Skokie Line.

In each case testimony and exhibits were admitted in evidence showing a substantial deficit in the income from the operation of the suburban service for the year 1941, and prior to that time. In no case would the proposed increase in rates be sufficient to overcome the deficit shown. In other words, had the proposed increase in rates been in force during the year 1941, there would still be a substantial deficit from the operation of the suburban service.

In the Rock Island case and in the Burlington case, exhibits and testimony were offered showing the value of the property and facilities used and useful in the suburban service. These values were based on the original cost of the facilities, except land. The land values used were the appraisals fixed by the Bureau of Valuation of the Interstate Commerce Commission. In the Milwaukee case and the North Shore case no evidence of the value of properties and facilities used and useful in the suburban service was offered. In those cases appellants take the position that inasmuch as the proof before the commission showed that the proposed increase in rates would not be sufficient to wipe out the deficit arising from the operation of the suburban service, the value of the property and the facilities used and useful in that service is immaterial.

In all four of the cases there was testimony and exhibits showing the allocation of direct expense to the suburban service and the apportionment of expenses jointly incurred in that service and the through passenger and freight and express service. The bases of such allocation and apportionment were given in detail. No evidence was offered except that introduced by appellants. Throughout the briefs of appellee, complaint is made that the apportionment of joint operating expenses was made only as between the suburban service and the through passenger and freight service, and that no division or apportionment was made of the expenses assigned or allocated to the suburban service, as between the commutation and the one-way and round-trip suburban service. It is argued that the portion of both direct and joint operating expenses allocated to the suburban service as a whole should have been further

broken down and segregated to the commutation service as distinct from the one-way and round-trip suburban service. The testimony and the exhibits before the commission show that the rates for one-way and round-trip fares were higher than the commutation fares; that the one-way and round-trip fares had been increased 10 per cent by the order *Ex Parte 148* of the Interstate Commerce Commission, entered on January 21, 1942. It is, therefore, obvious that inasmuch as the commutation rates were lower than the one-way and round-trip fares a further refinement of operating expenses and segregation of those expenses between the commutation service and other suburban service would only aggravate and increase the deficit in the commutation service. The commutation passengers and the one-way and round-trip passengers use the same facilities and are given identical service. The cost of carrying the commutation passenger would, therefore, be the same as the cost of carrying the passenger riding on a one-way or round-trip ticket. The evidence shows that the commutation rates produce a lower passenger-mile revenue than the one-way and round-trip fares.

Appellee also complains that in some of the cases there was no proof of the value of the facilities used and useful in the suburban service and in others that such values as were shown were not segregated between the commutation service and the one-way and round-trip suburban service. Reference has already been made to the showing in each case that the proposed increase in rates would be insufficient to overcome the deficit from the operation of the suburban service. The carriers were not seeking a return on any investment. They were merely seeking an increase in rates in order to reduce the operating deficits. In view of this evidence before the commission, the question of the value of the facilities used and useful in the suburban commutation service was academic. The commission also complains in its orders and in its briefs that there was no proof offered as to the original cost of the facilities used in the suburban service, less depreciation; the cost of reproducing the properties and facilities, less depreciation, or, the prudent investment in such facilities and land, fairly and justly used in rendering the suburban service.

As already related, the proof that was offered on the question of the value of the facilities used and useful in the suburban service was on the original cost basis. If the commission was of the opinion that the value of the property used and useful in the commutation service was material and that some other formula should be used in arriving at such values, it should have indicated the formula it would approve and required evidence to be offered on the basis of such formula. It could then have made a finding on the question of such value which could be reviewed by the courts, as contemplated by the Public Utilities Act. A hearing before the commission is not a partisan hearing with the commission on one side arrayed against the utility on the other. It is an administrative investigation instituted for the purpose of ascertaining and making findings of fact. It was manifestly arbitrary and unfair to raise in its final order, for the first time, the question of the correctness of the formula and the basis on which the evidence concerning the value of the property for rate making purposes was offered.

The commission also, in discussing the evidence in its orders relating to the allocation of joint expenses to suburban service, repeatedly asserts that such evidence could not be considered, because the commission was of the opinion the portion of such expenses charged to the suburban service was too high. In other words, the commission repeatedly asserts in its orders that it disregards the evidence and acts upon its own opinion and conclusions, not based upon any evidence in the case. In this the commission was in error.

At the request of the examiner during the hearings, statements of the system income of each of the carriers for a portion of the year 1942, as compared with like periods in 1941, were produced and admitted in evidence over the objection of the carriers. These exhibits showed only the total income from all classes of business, both freight and passenger, including both through and suburban, transported over the entire system, for the periods indicated. There was no attempt to show that any part of the increase in revenue shown by these exhibits was applicable to, or derived from, the suburban service or any

branch of such service. Based upon this increase in the incomes from the entire systems, the commission, in its orders, speculated that there had probably been a substantial increase in revenue from the suburban service during the year 1942, as compared with the year 1941. This was a pure speculation and an assumption by the commission, without any evidence in the record to support it. These exhibits did not show an increase in suburban revenues and afforded no basis for such conclusions.

The commission, in its orders, also recites that an examination of "Moody's Railroads, Weekly Cumulative Index, Volume 14, No. 23, issued Oct. 28, 1942 and No. 24, issued Oct. 31, 1942," showed that the gross operating revenues of the one hundred twenty-three Class I carriers of the United States for the nine-month period ending September 30, 1942, increased approximately 36.9 per cent over the corresponding period of 1941. From this and from the increase in the system revenues of appellants during a portion of the year 1942, over a like period of 1941, the commission reached the conclusion that during the year 1942, appellants had probably enjoyed a substantial increase in revenues from suburban commutation service and were not entitled to the proposed increase in rates. In this connection it should be noted that the publications referred to were not offered in evidence and were not published until October 28 and 31, 1942, after the hearings were concluded in May, 1942.

In *Atchison, Topeka and Santa Fe Railway Co.* v. *Commerce Com.* 335 Ill. 624, we said: "The commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such."

The dominant note of the approach of the commission to the consideration of the questions involved is epitomized in the following quotation from its order in the Milwaukee case: "It must be remembered that Respondent's operations embrace thousands of miles of railroad and runs through practically all states in the Northwest; that it oper-

ates through passenger service from and to and through the suburban zone to the principal cities in western territory; that the railroad was built and operated primarily for the conduct of through freight and passenger business; that suburban service was developed as communities developed in the Chicago area; that the equipment used in the suburban service, for the most part, is equipment that has been previously used in through service; and that suburban service is more or less a byproduct of railroad operations as a whole and any revenue over out-of-pocket expense received contributes that much to the financial prosperity of the carrier."

This language reflects the attitude of the commission in the consideration of the suburban service. The basis for this theory of the commission is contrary to law. In *Northern Pacific Railway Co.* v. *North Dakota,* 236 U. S. 585, 59 L. ed. 735, it was said: "We have, then, to apply these familiar principles to a case where the state has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost, or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported: That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The state cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses,

upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost, the entire cost must be taken into account."

In *Norfolk and Western Railway Co.* v. *Conley*, 236 U. S. 605, 59 L. ed. 745, the rule was announced as follows: "The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in *Northern Pacific Railway Co.* v. *North Dakota*, decided this day (236 U. S. 585, *ante* 735, 35 Sup. Ct. Rep. 429,) makes an extended discussion of this question unnecessary. It was recognized that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification of the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the state has no arbitrary power over rates; that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal. These considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and, of necessity, its own rates. In making a reasonable adjustment of the carrier's charges, the state is under no obli-

gation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."

In *Banton* v. *Belt Line Railway Corp.*, 268 U. S. 413, 45 S. Ct. 534, it was said: "There is involved only the rates applicable to a part of the company's business. In this respect, the case is similar to *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 35 S. Ct. 429, 59 L. ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; *Norfolk and Western Railway* v. *West Virginia*, 236 U. S. 605, 35 S. Ct. 437, 59 L. ed. 745; and *Northern Pacific Railway* v. *Department of Public Works of Washington*, 268 U. S. 39, 45 St. Ct. 412, 69 L. ed. 836, decided April 13, 1925. The applicable law is plain. The state is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper cost. And such cost includes not only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part. The cost of doing such business is not, and properly cannot be, limited to the amount by which total operating expenses would be diminished by the elimination of, or increased by adding, the transfer passengers in question. It would be arbitrary and unjust to charge to that class of business only the amount by which the operating expenses were, or would be, increased by adding that to the other traffic carried. Outlays are none the less attributable to transfer passengers because also applicable to other traffic. Operating expenses which are incurred on account of all passengers carried, and which are not capable of direct allocation to any class, should be attributed to the transfer passengers in question in like proportion as such expenses are fairly chargeable to other passengers receiving like

service. While the carrier has no constitutional right to the same rate or percentage of return on all its business, the state may not select any class of traffic for arbitrary control and regulation."

In *Mt. Carmel Public Utility and Service Co.* v. *Public Utilities Com.*, 297 Ill. 303, this court said: "Where a public utility corporation is engaged in furnishing to the public, through various departments of its business, different kinds of service, it cannot be compelled to carry on a branch of its business which furnishes one kind of such service at a loss even though at the same time its whole business may be conducted at a profit. (*Brooks-Scanlon Co.* v. *Railroad Com.*, 251 U. S. 396; *Northern Pacific Railroad Co.* v. *North Dakota*, 236 id. 585; *Norfolk and Western Railroad Co.* v. *West Virginia*, 236 id. 605.)" To the same effect is *Northern Illinois Light and Traction Co.* v. *Commerce Com.*, 302 Ill. 11.

In *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, it was said: "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a

railroad line is an entirety; that its income goes into, and its expenses are provided for out of, a common fund; and that its capitalization is on its entire line, within and without the state,—can have no application where the state is without authority over rates on its entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

In our opinion, the law as there stated, is still in full force and effect. The commission proceeded under a misapprehension of the settled rules of law applicable to the questions under consideration. This misconception of the applicable principles of law led the commission to the erroneous conclusions recited in its orders.

The orders cannot be sustained for the further reason that they contain no proper and essential findings. Section 65 of the Public Utilities Act (Ill. Rev. Stat. 1943, chap. 111⅔, par. 69,) provides that the commission shall make and render findings concerning the subject matter and facts inquired into, and enter its order based thereon. In *Chicago Railways Co.* v. *Commerce Com. ex rel. Chicago Motor Coach Co.*, 336 Ill. 51, we said: "Section 65 of the Commerce Commission act requires the commission to make and enter findings concerning the subject matter of facts inquired into and enter its order based thereon. Such findings must be specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it."

In *Louisville and Nashville Railroad Co.* v. *Commerce Com. ex rel. Village of Belle Rive*, 353 Ill. 375, it was said by this court: "Section 65 of the Public Utilities act (Cahill's Stat. 1931, par. 84,) requires that the commission make and enter findings of fact concerning the subject matter inquired into and enter its order based thereon. This is a mandate that the commission make findings of fact upon the principal issues of the case, and that such findings be sufficiently specific to enable the court to intelligently review the decision of the Commerce Commission and ascertain if the facts upon which the commission has based its order afforded a reasonable basis for such order. If

they do, the facts found may be re-examined, in connection with the evidence, to determine if they are substantially supported by the evidence, but this court will not enter upon an independent investigation of the evidence to develop facts not found by the commission to sustain its order. (*Chicago, Rock Island and Pacific Railway Co.* v. *Commerce Com.* 346 Ill. 412; *Kewanee and Galva Railway Co.* v. *Commerce Com.* 340 id. 266; *Business Men's Ass'n* v. *Commerce Com.* 337 id. 149.)" To the same effect are *Chicago, Rock Island and Pacific Railway Co.* v. *Commerce Com.* 346 Ill. 412; *Kewanee and Galva Railway Co.* v. *Commerce Com. ex rel. Dohrn Transfer Co.* 340 Ill. 266; *Brotherhood of Locomotive Firemen and Enginemen* v. *New York Central Railroad Co.* 339 Ill. 201, and *Business Men's Ass'n.* v. *Commerce Com.* 337 Ill. 149.

The orders in the four cases here under consideration do not comply with the mandatory requirements of section 65 of the Public Utilities Act. They do not contain any findings as required by that section. Said orders are void for the further reason that they are not based upon the evidence and are predicated upon matters wholly outside the evidence offered before the commission. They are in form merely arguments and conclusions based upon assumptions and speculations and are not supported by the evidence in the records. The orders are arbitrary, unreasonable and unlawful, and cannot be sustained.

This brings us to the consideration of cause No. 27897, Chicago and Western Indiana Railroad Co. v. Illinois Commerce Commission. The record in this case presents a somewhat different picture. The Chicago and Western Indiana Railroad Co. (hereinafter referred to as Western Indiana,) is primarily a terminal company. It furnishes stations and other facilities for the use of six trunk line railroads. It owns and operates Dearborn Street Station in Chicago. It also owns various tracks extending from said station to Dolton, Illinois, a distance of 16.6 miles, together with stations, signals, shops, yards, roundhouses and other facilities used in connection therewith. Its capital stock is owned in equal parts by five other railroads, namely: Chicago & Eastern Illinois, Grand Trunk, Wa-

bash, Monon, and Erie. These companies also lease from the Western Indiana the right to use Dearborn Station and other facilities, including tracks and right of way between said station and Dolton, Illinois. These lessee companies will be hereinafter referred to as proprietary tenants. A sixth company, the Atchison, Topeka & Santa Fe (hereinafter referred to as Santa Fe,) is also a tenant. The Santa Fe uses the Western Indiana rails and terminal facilities, but it owns no interest in that company. Each of the proprietary tenants pays a rental equal to one fifth of the interest requirements on the outstanding bonds of the Western Indiana, in so far as those bond issues cover the property which is used in common by said proprietary tenants. Each of said tenants likewise pays a rental equal to 100 per cent of the bond interest requirements applicable to the portion of the property which it uses exclusively. The Santa Fe has a 999 year lease, under which it uses the Deaborn Station and the Western Indiana tracks and terminal facilities between Twentieth street and Dearborn Station, which is a part of the Dearborn Station-Dolton line. It pays a stated rental in addition to one sixth of the cost of additions and betterments to the property which it uses in common with the other tenants.

The Western Indiana also owns other properties consisting of extensive yards and other facilities which are leased to the Belt Railway Company of Chicago. These properties, however, are not a part of the Western Indiana tracks and facilities, extending from Dearborn Station to Dolton. The property leased by the Belt Railway Company is used exclusively by that company. It maintains the leased property and pays stated rentals which are in excess of the interest requirements on bonds issued by the Western Indiana, representing money expended on the property leased to the Belt. The Elgin, Joliet & Eastern also leases from the Western Indiana other tracks and facilities which are not a part of the line of railroad extending from Dearborn Station to Dolton, and not a part of the properties leased to the Belt. It pays a fixed rental which is not required for interest payments. The amount of these rentals is not otherwise disclosed by the record.

Various portions of the line extending from Dearborn Station to Dolton are used by the five proprietary tenant lines and the Santa Fe, in common with the Western Indiana. This line is divided into some 50 wheelage zones or sections. The common or joint expenses of maintenance and operation are apportioned to the various wheelage zones, and then in turn such expenses apportioned to each zone are apportioned to the Western Indiana and the tenant lines, using that zone, on a wheelage basis. General expenses and taxes are apportioned on the same basis. The Western Indiana does all the switching for the tenant lines at Dearborn Station. It operates the Dearborn Station and is engaged in a small way in freight-switching service for other railroads, switching cars to and from various industries located on its own lines. In addition to this service the Western Indiana also operates a limited suburban passenger service between Dearborn Station and Dolton. In this service it uses the tracks and facilities extending from Dearborn Station to Dolton, various sections of which are used by the six tenant lines. It operates three suburban passenger trains in each direction daily, except on Saturday when the service is reduced. There is no service on Sunday. In the suburban service it uses train and engine crews engaged solely and exclusively in that service. It employs separate passenger, combination and baggage cars, devoted solely to that service. It uses two locomotives in the suburban service. The record shows that during the last five years preceding the hearings, its net income in excess of interest requirements was as follows: 1937, $441,117; 1938, $402,120; 1939, $456,651; 1940, $359,843; 1941, $363,667. During that period, each year it paid from revenues received from rentals and operations, a 6 per cent dividend on its $5,000,000 of outstanding capital stock. In addition to the payment of this annual dividend, it has accumulated a surplus of some $800,000, which is held in its surplus account. Upon its own figures submitted at the hearings, during the year 1941, and the four preceding years, the operation of its suburban service alone, disregarding all rentals received, resulted in a substantial deficit.

Following the increase in one-way and round-trip suburban rates authorized by the Interstate Commerce Commission, by its order *Ex Parte 148*, the Western Indiana filed tariffs with the Illinois Commerce Commission, by which it proposed to increase its commutation or multiple-ride ticket rates in the suburban service, approximately 10 per cent over existing rates. By the same tariffs it also proposed a substantial reduction in the one-way or single-trip ticket fares in that service. It does not carry through passengers. Its passenger business is limited to the suburban service between Dearborn Station and Dolton. The commission entered an order suspending the proposed rates and set the matter for hearing. Hearings were concluded in May, 1942. By an order entered on December 9, 1942, the commission refused to approve the increase in commutation rates and permanently suspended the proposed tariffs as to the commutation rates. It did, however, approve the proposed reduction in the one-way or single-trip fares. An appeal from that order was perfected by the railroad company to the circuit court of Cook county. Upon a hearing, that court affirmed the order of the commission. To reverse the order of the circuit court, the appeal was perfected to this court.

For the purposes of this case, the property and facilities leased to the Belt and the Elgin, Joliet & Eastern must be entirely disregarded. The line from Dearborn Station to Dolton, which is the line used in the suburban service, must be considered as the property used in that service. When so considered, the record shows a line of railroad extending from Dearborn Station to Dolton, a distance of 16.6 miles. The facilities include the Dearborn Station and all other stations and facilities used in the suburban service. Certain portions or zones of this line and these facilities are used by appellant Western Indiana in common with its six tenants. Under the lease contracts, all maintenance, operating and other joint expenses are divided on a wheelage basis between appellant and the six tenants, according to the zones in which the property is used in common. In the operation of this line and facilities, appellant, under those leases, incurs its proportionate share

of such expenses. The portion of these expenses allocated to appellant, plus the expenses which are directly incurred by it in the suburban service, represent the cost to appellant of furnishing the suburban service. As against this expense, it receives certain revenues from that service. It also receives the rentals under the leases from the six tenants for the use of the property used in the suburban service. On this side of the ledger it has sufficient net income from its suburban operations and from these rentals and the rentals received from the Belt and the Elgin, Joliet & Eastern, to pay all its operating expenses and all interest requirements and to provide and pay a dividend of 6 per cent, leaving a substantial balance in its surplus account, as net profits. This is the showing in the record. The rentals received from the property used in the suburban service, for rate-making purposes, must be regarded as income from that property.

If appellant desires and is willing to limit its own operations to a mere technical compliance with the statute (Ill. Rev. Stat. 1943, chap. 114, par. 77,) in order to enable it to lease its facilities to other railroads, it cannot set aside the rentals received for the payment of its interest requirements and dividends and to accumulate a surplus, until the expenses incurred in the limited operations which it maintains are paid. Such expenses are a first charge against those rentals. Neither can it pass on to the public any deficit in its operations in the form of increased rates as long as it derives a substantial net income from the rental of its facilities used in the suburban service.

The burden was on appellant to show that the proposed rates were not unreasonable. While the amount of the rentals derived from the property used in the suburban service was not separately shown, it is apparent that such rentals are substantial when compared with the $2206.28 in estimated additional annual revenues which appellant sought by the proposed increase in rates. On the whole record it is clear that when such rentals are properly considered, as they must be, as revenues arising from the property used in the suburban service, no deficit from the operation of that service, under the existing rates, was shown.

When the evidence in the record is considered, it is obvious that the finding of the commission that the proposed rates were unreasonable is not without substantial support in the evidence.

The fixing of rates is essentially a matter of legislative control. It is not a judicial function. The right to review the conclusion of the legislature, or of an administrative body acting under authority delegated to it by the legislature, is limited to the determination of whether the legislature or administrative body acted within the scope of its authority, whether the order is without substantial foundation in the evidence, or whether a constitutional right of the utility has been infringed upon. If the order does not contravene any constitutional limitation, is within the authority delegated to the commission, and has substantial basis in the evidence, it cannot be set aside by the courts. The courts are without authority to set aside an order of the commission on the facts unless it is against the manifest weight of the evidence. *Public Utilities Com. ex rel. City of Springfield* v. *Springfield Gas and Electric Co.*, 291 Ill. 209.

Upon the record in this case we cannot say that the order involved is without substantial basis in the evidence or that such order is either unreasonable or unlawful. The circuit court did not err in affirming the order of the commission.

In cause No. 27897, the judgment of the circuit court is affirmed. In causes Nos. 27894, 27895, 27896, and 27898, the judgment in each case is reversed and the cause remanded to the circuit court of Cook county with directions to set aside the order of the commission and to remand the cause to the commission.

The original records made before the commission were incorporated in the records filed in this court. The clerk of this court is directed to return said records to the clerk of the circuit court of Cook county.

No. 27897, Judgment affirmed;
Nos. 27894, 27895, 27896, and 27898,
Reversed and remanded, with directions.

APPENDIX "3"

Docket No. 27768—Agenda 15—March, 1944

ILLINOIS CENTRAL RAILROAD COMPANY, Appellee,

v.

THE ILLINOIS COMMERCE COMMISSION et al., Appellants

Mr. Chief Justice SMITH delivered the opinion of the court:

This is an appeal from a judgment of the superior court of Cook county under section 69 of the Public Utilities Act. (Ill. Rev. Stat. 1943, chap. 111⅔, par. 73.) The cause was there heard on appeal from the Illinois Commerce Commission under section 68 of said act. (Ill. Rev. Stat. 1943, Chap. 111⅔, par. 72.) On a hearing the trial court set aside the order of the commission. The appeal to this court was perfected by the commission. The proceedings involve only intrastate commutation suburban fares in the Chicago suburban area.

A brief reference to the historical background of the proceedings will be helpful to an understanding of the questions involved. Prior to December 9, 1925, the Interstate Commerce Commission granted to the railroads generally a 20 per cent increase in freight and passenger rates throughout the country. This increase did not apply to intrastate suburban rates. Following the granting of this increase by the Interstate Commerce Commission, the Illinois Central Railroad Company filed tariffs with the Illinois Commerce Commission for a corresponding increase in its suburban rates in its Chicago suburban area. On December 9, 1925, after a hearing, the commission denied the 20 per cent increase, but granted a 15 per cent increase, over existing rates.

Thereupon, appellee filed a suit in the Federal District Court for the Northern District of Illinois for an injunction to restrain the commission and certain other public officials from enforcing the order of the commission and from interfering with appellee in putting into effect the proposed 20 per cent increase in such rates. Application for a tempo-

rary injunction was heard on December 26, 1925, by a statutory three-judge court. A temporary injunction was issued. Thereafter, on January 7, 1928, the cause was heard on the merits by a like statutory court. A final decree was entered making the injunction permanent. No appeal was taken from that decree. By the decree it was provided:

"That the defendants, and each of them, their attorneys, agents and representatives, their successors in office, and all other persons whatsoever, be perpetually restrained and enjoined from taking any steps whatever to interfere with the right of plaintiff to charge and collect for commutation service rendered in Cook County, Illinois, the fares and charges provided for in Tariffs No. 376 (Illinois Commerce Commission No. 700,) and No. 377 (Illinois Commerce Commission No. 701,) filed by the plaintiff with the Illinois Commerce Commission; or from instituting any suits or actions to enforce, so far as plaintiff is concerned, the order of said Illinois Commerce Commission entered on December 9, 1925, in cause No. 14866 on the docket of said Commission, or from taking any steps or instituting any proceedings to impose fines upon, or recover penalties from, plaintiff because of plaintiff's action in enforcing from and after January 1, 1926, the said tariffs named hereinabove and collecting the fares and charges provided therein."

Under the protection of the temporary injunction issued in that case on December 26, 1926, appellee, on January 1, 1926, put into effect the proposed 20 per cent increase in existing suburban rates and fares in its Chicago suburban area. At that time appellee's suburban service and equipment was operated exclusively by steam power. Some years later it was changed to electrical equipment and power, and has since been operated exclusively as an electric system. With the electrification of the system substantial changes and improvements were made in the service. The increased rates, under the protection of the injunction, were continued until sometime after this change was made.

Beginning in 1936, appellee, from time to time, filed various tariffs with the commission by which certain changes were made in its suburban rates. The rates fixed by these tariffs are referred to in the tariffs themselves, and in the

record, as "experimental rates." While these experimental rates were changed from to time, they were always kept below the injunction level of 20 per cent in excess of the rates in force immediately prior to January 1, 1926. The commission did not interfere with appellee in charging these rates or when the rates were either increased or reduced by tariffs filed with the commission. The record shows that these experimental rates were in force at the time this proceeding was instituted.

On January 21, 1942, the Interstate Commerce Commission granted to the railroads throughout the country, another general increase of 10 per cent in passenger rates and fares within its jurisdiction. At that time a 10 per cent increase in a substantial portion of appellee's prevailing intrastate commutation fares in its Chicago suburban area would not raise those fares above the rates approved by the decree, entered in 1928, in the injunction suit. This order of the Interstate Commerce Commission was a general order applying to all railroads in the United States of the class to which appellee belonged. That order is designated in the record and will be hereafter referred to as *Ex Parte No. 148.*

On January 28, 1942, appellee filed its petition with the Illinois Commerce Commission for authority to file tariffs, on short notice, increasing by 10 per cent its intrastate suburban commutation fares in its Chicago suburban area, effective on the effective date of *Ex Parte No. 148,* which was applicable to its interstate and through rates. The commission refused to grant this authority. Thereupon tariffs were filed by appellee with the commission increasing by 10 per cent its suburban commutation rates between points within the State of Illinois. By the tariffs filed, these rates were to become effective on March 8, 1942. At the same time like applications and tariffs were filed, effecting the same character of rates, by a number of other carriers operating in the Chicago area. The commission entered separate orders suspending the proposed tariffs and docketed each application separately. The tariffs filed by appellee at that time are designated as Nos. 4258 and 4259. (All tariffs are referred to in this opinion by Illinois Commerce Commission numbers, unless otherwise noted.)

At the same time appellee filed with the commission Supplement No. 7 to Tariff No. 3755, which merely provided for the cancellation of the then effective tariffs applicable to such rates.

It is obvious that at the time Tariffs Nos. 4258 and 4259 were filed, appellee was of the opinion that the order of the Interstate Commerce Commission, *Ex Parte No. 148*, authorized it to increase all its rates, both intrastate and interstate, to the extent of 10 per cent, including suburban rates. The Illinois Commerce Commission, however, was of the opinion that *Ex Parte No. 148* did not apply to suburban rates. It based its orders denying authority to file the tariffs on short notice, and its orders suspending the proposed rates, on its construction that *Ex Parte No. 148* did not apply to intrastate suburban rates.

Thereupon, Charles M. Thomson, as trustee of the property of the Chicago and North Western Railway Company, which was one of the carriers against whom one of said suspension orders was entered by the commission, filed a suit in the Federal District Court for the Northern District of Illinois, to enjoin the commission, the Attorney General and other public enforcement officers from taking any steps to prevent said railway company from making effective the proposed increase of 10 per cent, in its intrastate suburban fares, in the Chicago area. By the complaint in that case it was alleged, among other things, that *Ex Parte No. 148* superseded the jurisdiction of the Illinois Commerce Commission and that under said order the plaintiff was authorized to increase its intrastate suburban rates 10 per cent over existing rates, without the approval of the Illinois Commerce Commission. The purpose of the suit was to enjoin the enforcement of the order of the commission disapproving such increase and suspending the proposed rates.

Upon a hearing by a statutory three-judge court, an injunction was granted as prayed for in the complaint. The District Court held that the order of the Illinois Commerce Commission, disapproving the proposed increase of 10 per cent was invalid as to intrastate commutation fares, for the reason that said order was in conflict with *Ex Parte No. 148*, which it was held applied to such rates. By its decree, it perpetually restrained and enjoined the commission and

the enforcement officers from enforcing the order and from interfering with the collection of the fares prescribed by the proposed tariffs, filed with the Illinois commission, based upon the 10 per cent increase.

An appeal from that decree was taken by the commission to the Supreme Court of the United States. That court, being in doubt as to the intended scope of the Interstate Commerce Commission's order, *Ex Parte No. 148*, requested that commission to file a brief in the cause, discussing its construction of the meaning and application of said order. In compliance with this request, such brief was filed. In that brief the Interstate Commerce Commission took the position that is order, *Ex Parte No. 148*, was not intended and should not be construed to direct the 10 per cent increase in existing Illinois Intrastate commutation fares. In discussing this brief, the court observed, "Although the brief is not wholly free from obscurity surrounding the order itself the Commission's ultimate position that the order is inapplicable to these particular commutation fares is one which, under all the circumstances of the case, we accept." The Court held that *Ex Parte* No. 148 did not apply to the intrastate commutation rates in the Chicago area, involved in the case. The decree of the District Court granting the injunction was reversed. *Illinois Commerce Com.* v. *Thomson*, 318 U. S. 675, 63 S. Ct. 834.

The decision in the above case obviously disposed of the contention of appellee in this case that *Ex Parte* No. 148 was applicable to the rates here involved and that under that order it was entitled to make effective a 10 per cent increase in its suburban commutation fares without authority from the Illinois Commerce Commission. That case was decided April 12, 1943.

The order of the commission involved on this appeal was entered on November 24, 1942. By the order the commission found that the rates proposed in tariffs Nos. 4258 and 4259 were not just and reasonable and said tariffs were permanently suspended and cancelled. It further ordered that the schedule of rates of appellee on file with the commission and in force and effect on March 7, 1942, be continued in effect until the further order of the com-

mission. By the order, appellee was directed to publish, post and file with the commission, effective on or before December 30, 1942, appropriate supplements cancelling Supplement No. 7 to Tariff No. 3755 and also cancelling Tariffs Nos. 4258 and 4259.

Appellee next contends that the decree in the injunction suit entered by the Federal Court in January, 1928, prohibits the commission from interfering with it in raising its intrastate suburban commutation rates to the level of the rates approved by said decree. It further contends that as to a large portion of such rates, which were in effect on March 7, 1942, the increase of 10 per cent would not raise the fares above the rates approved by the injunction decree. These are the rates covered by Tariff No. 4259.

As to approximately 20 per cent of its suburban commutation fares, prevailing on March 7, 1942, which the increase of 10 per cent would raise above the level of the rates approved by that decree, being the rates covered by Tariff No. 4258, appellee contends that, wholly apart from the action of the Interstate Commerce Commission, by *Ex Parte* No. 148, and entirely aside from the proceedings in said injunction suit, the evidence in this record justifies the proposed increase of 10 per cent, which the commission disapproved. In other words, appellee challenges the jurisdiction of the commission to make any order at all with reference to the rates proposed in Tariff No. 4259, which are within the injunction level. It asserts that the only rates which it was required to justify are the rates proposed by Tariff No. 4258, which it seeks to raise above the level of the injunction. It further contends that even though it be held that it also had the burden of justifying the rates proposed in Tariff No. 4259, it has discharged that burden by the evidence in this record.

Before entering upon a consideration of this and other questions in the case, it will be necessary to dispose of a procedural contention raised by appellant. It is contended that the commission was without jurisdiction to grant an increase in rates for the reason that appellee failed to notify the Federal Emergency Price Administrator of the

pendency of the proceedings, as required by the amendment to the Emergency Price Control Act of 1942, passed by the Second Session of the Seventy-seventh Congress, and the regulations promulgated under said act. This amendment to the Emergency Price Control Act, which became effective on October 2, 1942, contains the following provision: "* * * Provided, that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase." Public Law 729—77th Congress—2nd Session; 50 U. S. C. A. 901; U. S. C. A. Congressional Service, 1942, No. 9, p. 1202.

On October 14, 1942, the Director of Economic Stabilization issued his Directive No. 1, in which he designated the Price Administrator of the Office of Price Administration as a representative of the Director of Economic Stabilization, to receive notice of proposed increases in common carrier or other public utility rates, to issue appropriate regulations for the receipt of such notices and to intervene and participate in proceedings before Federal, State and municipal authorities, in connection with any proposed increase in such rates and charges.

In answer to this contention of appellant, appellee first contends that it was not required to notify the Office of Price Administration as provided in said act, for the reason that the increase in rates which it sought was not a "general increase," within the meaning of the Emergency Price Control Act, as amended on October 2, 1942. A reference to the amendment discloses that by its broad language the Congress conferred upon the President practically unlimited administrative powers. In the exercise of those powers the Office of Price Administration on November 12, 1942, issued Procedural Regulation 11. Section 1300.902 of that regulation provides:

"*General requirements with respect to notices.* Thirty (30) days before the effective date of a general increase

in the rates or charges of any common carrier or other public utility, there shall be filed with the Transportation and Public Utilities Division of the Office of Price Administration, Washington, D. C., two copies of notice of such proposed increase, except as otherwise provided in paragraphs (d) and (e) of section 1300.904. Such notices shall be deemed to have been filed when received in the Office of such Division. If authority for the establishment of any such increase is required by any regulatory agency, notice shall be given on or before the time such authority is sought in order that the Price Administrator may have timely opportunity to intervene, but in no event shall such notice be given less than 30 days before such proposed increased rates or charges are to become effective. All notices shall state the name and address of the Federal, State or municipal authority having jurisdiction over the rates or charges in question.

"Each such notice shall contain a statement that the common carrier or other public utility consents to the timely intervention by the Price Administrator, on behalf of the Director of Economic Stabilization, before the Federal, State or municipal authority having jurisdiction to consider such increase.

"One copy of each notice must be over the signature of an executive officer, a responsible traffic officer, or a duly authorized attorney or agent of the carrier or other public utility. Duly authorized officers of corporate agents shall sign on behalf of such agents. The person signing the notice shall certify that the information contained therein is true to the best of his knowledge, information and belief."

By section 1300.901 of the regulation the term "general increase" in the rates or charges of a common carrier or other public utility is defined as "any change in its rates, fares, classifications, rules, regulations or practices which results in an increase in the charges for transportation or other public utility service applicable to a class of passengers, shippers or customers, including increases in wholesale or industrial rates or charges for public utility services, as distinguished from an increase of rates or charges ap-

plicable to a particular customer or transportation service under special arrangement."

In view of the broad general powers granted to the President by the Emergency Price Control Act and by the amendment of October 2, 1942, to said act, we are of the opinion that this regulation, defining what shall constitute a "general increase" in common carrier or utility rates, within the meaning of the act, was not beyond the powers conferred. We, therefore, conclude that the proposed increase in rates sought by appellee was a "general increase" within the language and meaning of the amendment of October 2, 1942, to the Emergency Price Control Act. We are further of the opinion that appellee was required to give the notice prescribed by said amendment, unless it was relieved from so doing by the fact that the proceedings in this cause were instituted and the hearings had been concluded prior to the effective date of the amendment.

This brings us to the contention of appellee that it was not required to give notice to the Federal Emergency Price Administrator, as required by said amendment, for the reason that the proceedings herein were instituted and had proceeded to the point where the taking of evidence had been concluded and the case taken by the commission for decision, before the provisions of the Emergency Price Control Act, relied upon by appellant, became effective.

The record shows that the proceedings here involved were instituted before the commission on February 6, 1942. Following that date, various successive temporary suspension orders were entered. By these several suspension orders, the proposed rates were suspended for a total period of ten months, from February 6, 1942. Hearings were had before the commission during the months of March, April and May, 1942. On May 16, 1942, the hearings were concluded and the case was marked "Heard and Taken," by the commission. The amendment to the Emergency Price Control Act of 1942 was passed by Congress on October 2, 1942. The provision with reference to carrier and other utility rates was not in the Emergency Price Control Act of 1942, as originally enacted on January 30, 1942. (50 U. S. C. A. 901.) That provision was first brought into the act by the amendment passed on October 2, 1942.

No question is raised but what appellee gave to all parties entitled thereto all notices required by statute at the time the proceedings were instituted. The jurisdiction of the commission was then lawfully invoked according to the statute, upon proper notice. Having invoked the jurisdiction of the commission in a statutory proceeding, in the manner provided by the statute, and having given notice, in accordance with the statute, to all parties who were, at the time the proceedings were instituted, entitled to such notice, we are not impressed with the argument that either the jurisdiction of the commission, or the proceedings, could be affected by the failure to notify some other party who was not, at the time the proceedings were instituted, entitled to any notice at all. The amendment to the Emergency Price Control Act was not passed until several months later. It was not retroactive. It seems to us that it was not contemplated that, in any event, the failure of a carrier to comply with the provisions of the Emergency Price Control Act should affect the jurisdiction of a State commission or other regulatory body. The failure to give the required notice certainly could not affect such jurisdiction lawfully acquired prior to the adoption of the amendment to the Emergency Price Control Act. Its obvious purpose was to give to the agency designated by the President an opportunity to be heard before such commissions in cases involving increases of carrier and utility rates and to enable such agency to appear and oppose the granting of such increases if it was felt that such appearance was necessary. Rather than restricting or limiting the jurisdiction of such regulatory bodies, the act enlarges their jurisdiction so as to permit a government agency to appear and be heard, which was a right not theretofore given to such agencies.

The order in this case did not grant, but on the contrary, denied, increases in rates. It may well be that if the commission had entered an order allowing the increases, then, because of the posthumous passage of the amendment of October 2, 1942, to the Emergency Price Control Act after the hearings were concluded and before the order was entered, before the increased rates could be put into effect appellee would be required to notify the Office of Price Ad-

ministration, in accordance with that amendment. In no event was this a matter which would affect the jurisdiction of the commission to proceed in a pending case. Had the proposed increased rates been granted by the commission after the effective date of the amendment, it might be argued that appellee could not make such increased rates effective without complying with the amendment. The negative order of the commission, here involved, denying the proposed increase in rates, in nowise affected the right of the Office of Price Administration to be heard in opposition to the proposed increase in rates. The most that could be said of appellee's failure to notify the Office of Price Administration, after the 1942 amendment became affective, is that it would not have been in a position to have made effective an increase in rates, had such increase been granted by the Illinois commission, until it had also complied with the Emergency Price Control Act. The necessity of approval of rates by both a State and Federal authority is not unusual. In our opinion, the contentions of appellant, on this branch of the case, cannot be sustained.

In the logical sequence of the issues presented, this brings us to the question of the effect of the injunction issued by the Federal District Court on December 26, 1925, and made permanent by the final decree of that court, entered on January 7, 1928. The record shows that on January 1, 1926, under the protection of the temporary injunction, appellee, by Tariff No. 700, increased its commutation suburban fares 20 per cent above the rates existing prior to that date.

The record shows that the rates which were put into affect, as of January 1, 1926, under the protection of the injunction, were continued in force until 1936, On September 18, 1936, appellee filed with the commission, Tariff No. 3537. By this tariff, which became effective on that date, the existing rates which became effective on January 1, 1926, under the protection of the injunction, were reduced approximately 20 per cent. Certain other adjustments were made. It was stated in the tariff that these rates were established for experimental purposes. By other tariffs filed subsequent to September 18, 1936, other changes and adjustments were made in existing rates.

As already stated, on March 8, 1942, appellee filed Tariffs Nos. 4258 and 4259, by which all suburban commutation fares were increased approximately 10 per cent for the alleged purpose of meeting wartime increases in costs of operation. The rates proposed by Tariff No. 4258 were those which a 10 per cent increase in the existing suburban rates would raise above the rates which became effective on January 1, 1926, under the protection of the injunction. The rates proposed by Tariff No. 4259, however, were those which the proposed increase in the existing rates would not raise above the rates which became effective on January 1, 1926, under the protection of the injunction. By Tariff No. 4259, where a 10 per cent increase in existing rates would result in higher fares than those which became effective on January 1, 1926, such fares were, by that tariff, increased up to, but not in excess of, the rates effective on January 1, 1926. In other words, the rates proposed in Tariff No. 4259 were all within the injunction level.

It is the contention of appellee that the injunction decree is still effective and prohibited the commission from interfering with appellee in, or exercising its jurisdiction to prevent appellee from, increasing its fares up to the level of the rates approved by that decree, and which became effective as of January 1, 1926.

As to Tariff No. 4259, appellee contends that it is governed solely by the injunction decree. It further contends that as to those rates, it is not subject to the authority or orders of the commission, as long as it does not raise the rates above the level of the rates approved by that decree.

It is true that the final decree entered in January, 1928, made the injunction theretofore issued permanent. No appeal was taken from that decision. It was, and is binding upon all of the parties to the record. Nevertheless, the relation of the rates, approved by that decree, to the service rendered at that time, cannot be disregarded. In construing that decree and in determining its effect, we must take into consideration the character of the service which was within the contemplation of the decree. Undoubtedly the decree is binding and has perpetual efficacy as to the rates and service involved in that case. The

record shows, however, that since that time both the service and the rates have been materially changed. At that time appellee's suburban system was operated by steam, and was, to all intents and purposes, a steam railroad. Since then the system has been completely electrified. It is now operated as an electric system. The service rendered is vastly different from the service for which the rates were authorized by the 1928 decree. The fact that appellee, in 1936, by Tariff No. 3537, voluntarily reduced the rates protected by the injunction decree to the extent of 20 per cent, constitutes an admission by appellee that its operating cost had been materially decreased. The adjustments thereafter made in the rates, prior to March 8, 1942, even though such adjustments were made for experimental purposes, indicate that the operating cost was constantly changing. The voluntary 20 per cent reduction, made in 1936, is conclusive that appellee had not only materially changed the service, but had also experienced a reduction in operating cost. There can be no contention upon this record that the service rendered by appellee for the past several years is not of a wholly different character from the service rendered at the time the injunction decree was entered in 1928. The decree is effective only as to the rates permitted for the same character of service which was being rendered at the time the decree was entered. The value of the property devoted to the rendition of the services at the time the decree was entered must also be considered with reference to the present value of the property devoted to the present service.

In 1936, appellee realizing that it was not entitled to charge, for the service rendered at that time, the same rates which it was permitted to charge for the different service which it was rendering at the time the decree was entered, voluntarily reduced those rates 20 per cent. It thus voluntarily abandoned the rates approved by the decree and sought to adjust such rates independently of the decree, upon the basis of the service rendered and the cost of operation at that time. It is true the decree established only a maximum rate within which the commission could not interfere. There was nothing in the decree to compel appellee to charge the maximum rates approved by the de-

cree. Nevertheless, when it determined in 1936, that its rates were too high, and to voluntarily submit to a reduction, we think this constituted an abandonment of the maximum rates fixed by that decree. We know of no rule of law which would permit one party to litigation to obtain a decree for his protection and then, after he has voluntarily disregarded and relinquished his reliance upon the decree over a period of years, again enforce the decree against the other party, when conditions have so changed as to make the enforcement of the decree desirable and favorable to him. The filing of the subsequent tariffs with the commission, whenever any changes in rates were proposed, was a recognition of the jurisdiction and authority of the commission, notwithstanding the decree.

An injunction does not create a right. It merely protects the rights of plaintiff from unlawful or injurious interference. In thus preventing, it does not give a perpetual or vested right in the remedy, the law governing the injunction, or the effect of it. The plaintiff is not entitled to the same measure of protection at all times and under all circumstances. An injunction decree which is entered upon facts which are not of such a permanent character as to be substantially impervious to change, is both executory and ambulatory. It marches along with time. 28 Am. Jur., sec. 314, p. 485.

In *United States* v. *Swift & Co.* 286 U. S. 106, 52 S. Ct. 460, it was said: "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. (*Ladner* v. *Siegel*, 298 Pa. 487, 494, 495, 148 A. 699, 68 A. L. R. 1172; *Emergency Hospital* v. *Stevens*, 146 Md. 159, 126 A. 101; *Larson* v. *Minn. N. Electric Ry. Co.* 136 Minn. 423, 162 N. W. 523; *Lowe* v. *Prospect Hill Cemetery Ass'n*, 75 Neb. 85, 106 N. W. 429, 108 N. W. 978.) The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."

In the case of *Smith* v. *Illinois Bell Telephone Co.* 270 U. S. 587, 46 S. Ct. 408, the same rule was announced.

In that case the telephone company brought the suit against the members of the Illinois Commerce Commission and the Attorney General to enjoin them from enforcing or attempting to enforce a schedule of rates alleged to be confiscatory, and from taking any steps or proceedings against the company to prevent it from collecting rates and charges under another and higher schedule. A permanent injunction was granted in accordance with the prayer of the complaint by the District Court for the Southern District of Illinois. The purpose of the suit and the provisions of the decree were substantially identical with the suit and the decree relied upon in this case. On appeal to the Supreme Court the members of the Commerce Commission argued that the effect of the decree was to prohibit them from enforcing in the future, any legislative remedy for excessive charges thereafter imposed, within the level of the decree, however, unreasonable such charges might be. In other words the contention was that the injunction decree ousted the commission of authority and jurisdiction to supervise and regulate the rates of the utility in the future. In answering this argument the court said, "there is nothing in the decree, rightly construed, which attempts to curtail or could curtail the legislative or rate-making powers of appellants to proceed hereafter under the State law, subject to such limitations, if any, as may be required by the doctrines of *res judicata*, ordinarily applicable in such cases."

The same rule applies to the decree relied upon in this case. It must be construed as applying to the conditions existing at the time the decree was entered. Any attempt to apply that decree to a subsequent change in conditions or to a different service or rates, is governed solely by the rules of law applicable to the doctrine of *res judicata*.

It is our conclusion that, in view of the fact that appellee has entirely changed the character of its system and equipment, as well as the service rendered, and the further fact that it, in 1936 and subsequently, voluntarily abandoned the maximum rates approved by the decree, it is not now in a position to enforce or invoke the decree as taking from the commission its jurisdiction over the rates here

involved. In our judgment this case must be determined upon the showing as to facts now existing, just as though the injunction decree had never been entered, subject only to the rules of law applicable to the doctrine of *res judicata*.

This brings us to the consideration of the question of whether the order of the commission, here involved, was unreasonable or unlawful. It was found by the trial court to be both unreasonable and unlawful. The basis for such finding was that insufficient findings were made; that the order has no substantial foundation in the evidence; that the commission exceeded its power and that the order is contrary to law. The order was set aside.

The limitations imposed upon the courts in reviewing orders of the commission are well defined. The law is settled that the matter of rate regulation is essentially legislative. The fixing of rates is not a judicial function. The jurisdiction of the courts to review the orders of the commission, acting under authority delegated to it by the legislature, is limited to the determination of whether or not it acted within the scope of its authority, or whether the order is without substantial foundation in the evidence, or whether a constitutional right of the utility has been infringed upon by fixing rates which are confiscatory or insufficient to pay operating expenses and leave for the utility a reasonable return on the present value of its property, used and useful, in the public service. (*Chicago, Milwaukee and St. Paul Railway Co.* v. *Public Utilities Com.* 268 Ill. 49; *Public Utilities Com. ex rel. Mitchell* v. *Chicago and West Towns Railway Co.* 275 Ill. 555.) If the order of the commission does not contravene any constitutional limitation or rule of law and is within the constitutional and statutory authority of the commission, and has a substantial basis in the evidence, it cannot be set aside by the courts. *Public Utilities Com. ex rel. City of Springfield* v. *Springfield Gas and Electric Co.* 291 Ill. 209; *Public Utilities Com. ex rel. Allis Brick Co.* v. *Chicago, Milwaukee and St. Paul Railway Co.* 287 Ill. 412; *Chicago Motor Bus Co.* v. *Chicago Stage Co.* 287 Ill. 320; *Public Utilities Com. ex rel. Chicago Board of Trade* v.

Toledo, St. Louis and Western Railroad Co., 286 Ill. 582; *Public Utilities Com. ex rel. East St. Louis Stone Co.* v. *Terminal Railroad Ass'n*, 281 Ill. 181.

The courts will not set aside an order of the commission unless it is arbitrary or unreasonable or clearly violates some rule of law. The purpose of a review of orders of the commission by the courts is to keep the commission within its jurisdiction so as not to violate any rights guaranteed by the constitution. *South Chicago Coal and Dock Co.* v. *Commerce Com.* 365 Ill. 218; *Commerce Com. ex rel. Lumaghi Coal Co.* v. *Chicago and Eastern Illinois Railway Co.* 332 Ill. 243.

The legislature has vested in the Commerce Commission the exclusive function of fixing rates of public utilities which will be just and reasonable and produce a fair return on the property used and employed in the public service. Even though a court holds that the rates authorized by the commission are inadequate or illegal and restrains their enforcement, it cannot make new rates. Orders of the commission are entitled to great weight and the courts will not set aside such orders unless they are arbitrary or unreasonable or clearly violate some rule of law. *Peoples Gas Light and Coke Co.* v. *Slattery*, 373 Ill. 31.

With these limitations in mind, we proceed to a consideration of the order here involved. The only evidence before the commission was that offered by appellee. As already indicated, the rates involved are those only which are applicable to appellee's suburban service in the Chicago suburban zone. Substantial evidence was offered bebefore the commission showing that appellee's suburban service is operated as a separate service, distinct from its system service. There was no evidence offered to the contrary. This evidence shows that the suburban service originated in 1856. At that time the operations extended from Randolph Street to Hyde Park (53d Street.) In 1862 it was extended to Woodlawn (63d street); in 1871 to Grand Crossing (75th street); in 1873 to Kensington (115th street); in 1880 to Pullman; in 1890 to Harvey and Homewood; in 1892 to Blue Island; in 1893 to South Chicago; in 1900 to Flossmoor, and in 1912 to Matteson, which is its present southern terminus.

The track arrangements used in the suburban service includes three tracks from Randolph street to Eleventh street; six tracks from Eleventh street to Fifty-first street, which connect with the Fifty-third street station; four tracks from Fifty-third street to Kensington; two tracks from Kensington to Matteson; a single track between Kensington and Blue Island, and two tracks from Sixty-seventh street to South Chicago. These tracks are used exclusively for suburban service. They are not used for through freight or passenger service. The distance from Randolph street to Matteson is 28 miles; from Randolph street to South Chicago, 11.6 miles; from Randolph street to Blue Island, 18.3 miles. All stations are used exclusively in the suburban service, except five, namely; Fifty-third street, Kensington, Harvey, Homewood and Matteson. A portion of the facilities of these five stations is used jointly for both suburban and through service.

The equipment includes a total of 280 motor cars and trailers. They are operated in multiples of two, except during rush hours, during which time from two to eight cars are used in each train. The entire suburban system is electrified and all trains are operated by electricity. Separate shop facilities are maintained for suburban equipment. Separate yards are used exclusively for suburban operations. All suburban stations are equipped with a special type of platform so that passengers are enabled to enter and leave the cars without using steps. The platforms of cars and stations are of the same height. The operations consist of 458 trains per day on week days, and 289 trains on Sundays. Twenty-four-hour service is provided. Seven hundred seventy-four employees are engaged exclusively in the suburban service. These employees include station janitors, matrons, crossing flagmen, trainmen, engineers, gatemen, collectors, flagmen, yardmasters, switchmen, levermen, clerks, mechanics, carmen, electricians, oilers, car cleaners, hostlers and foremen. Since 1925, appellee has completely reconstructed its suburban system by a change-over from a steam-operated suburban service to electrified service, devoted exclusively to the handling of suburban traffic. No through trains make use of the suburban facilities. Except as to the five stations above men-

tioned, no suburban trains use facilities which are used by through trains. There is no interchangeability of either equipment or manpower.

Evidence was offered on the question of values of property used and useful, in both the suburban and through service, allocating to each its just proportion of property used jointly in both branches of service. Joint expenses were in like manner allocated. The evidence touching the question of the value of the property, used and useful and devoted to the suburban service, tended to show that, under any formula approved by the Supreme Court in *Federal Power Com. v. Natural Gas Pipeline Co.* 315 U. S. 575, 62 S. Ct. 736, for arriving at such values, the present rates would not produce a fair return on the investment. The commission disregarded this evidence in its entirety. It refused to consider or to attempt to segregate or allocate these values and expenses, as between the suburban and and through service. Instead, it proceeded upon its conclusion that, notwithstanding this undisputed evidence in the record, the suburban service did not constitute a separate and independent service and that the commission could not consider the suburban service separately. It proceeded upon the theory that the only question to be determined was whether the revenues derived from the entire system, both freight and passenger, through and suburban, and including both interstate and intrastate business, were sufficient to yield a fair return on the value of the properties used in its entire system, wherever located. Its findings and order are based on the premise that if the combined revenues from all sources from the entire system were sufficient to produce a reasonable return on the fair value of its property, devoted to the public service by the entire system, the return from its property devoted to its suburban service was wholly immaterial, and that it would not attempt to determine whether, under existing rates, appellee was conducting its suburban service at a loss, or less than a reasonable return upon the investment employed in that service.

The commission asserted that it took this position because there was evidence in the record that the income from the suburban service goes into and is treated as a part of

the general corporate funds, and that all expenses for materials and supplies and disbursements, in connection with the operation of the suburban service, were paid out of the general corporate funds, and upon the further fact that some of the facilities were used jointly for both suburban and through service.

Exhibits and testimony were offered by appellee, setting forth in detail the allocation of joint operating expenses and taxes. To these exhibits were attached the formulas constituting the bases of the division and apportionment of joint expenses to suburban and through service. These exhibits set out in detail the allocation applicable to each joint account and the basis for the allocation. The allocation of property values used jointly in both branches of service was shown in the same way. Such values were allocated on the same basis.

The commission apparently attached some importance to the fact that the evidence showed that the income from suburban service was treated as a part of the general corporate funds of appellee. This fact, however, is wholly without significance. It could not be treated otherwise. The entire income from all branches of service, and any other possible sources, constituted its general corporate funds. The important fact is that, nevertheless, the accounts, were kept separately, even though the income from all classes of service ultimately became a part of the general corporate funds. The commission failed to distinguish between corporate funds and corporate accounts.

The dominant basis of the order of the commission is its finding in paragraph III "that the suburban service is in fact but a segment of the entire Illinois Central System and it therefore cannot consider the suburban service as an institution in and by itself." Later, in discussing property values, its views are expressed in the following language: "In view of the investment in the property of Petitioner, as disclosed by the record, and hereinabove set forth and referred to, there can be no doubt but that the Petitioner is earning and will continue to earn during the war emergency a just and reasonable return upon the property investment account, because it must be assumed, in view of

the relation of the capital structure and funded debt account to the property investment account, that operating revenue to the extent of approximately $12 per share on the common stock of the Petitioner would constitute a just and reasonable return, at least during the period of the war emergency, if not thereafter, during the period in which a somewhat approximate return is realized by the Petitioner. The fact that the net return realized by the Petitioner from the suburban service may not equal the corresponding return from the freight and other services rendered by Petitioner on its system as a whole, is of minor importance, having in mind that the system revenue derived by Petitioner is sufficient to yield to the investors what would appear to be a just and reasonable return."

In paragraph VI of the order, the commission found: "The Commission has hereinabove set forth its opinions and findings to the effect that the services rendered by Petitioner in its suburban service cannot be segregated and treated apart from its system service, but on the contrary constitute an integral part of its system service and should be so considered in determining whether a just return upon investment of Petitioner's system as a whole is presently accruing. Accordingly, the Commission is of the opinion and so finds that the proposed rates involved herein are and must be held to be unjust and unreasonable."

It will, therefore, be seen that the commission definitely refused to give consideration to the suburban service as separate from the system service of appellee. It found that, taking into consideration the operation and revenues of the entire system, appellee was receiving a reasonable return from its whole system upon its system investment. Having reached this conclusion, it further found that the question of whether or not the suburban service, as a separate service or system, was earning a return on the investment devoted to that system was wholly immaterial. It refused to consider the question of whether the revenues from suburban service were remunerative or confiscatory, or whether such revenues were sufficient to pay operating expenses. It thus refused to consider the fair value of appellee's property devoted to the suburban service, as well as the income derived from that service.

In reaching this conclusion, the commission wholly disregarded both the law and the evidence. It was fundamentally wrong, as a matter of law, in refusing to consider the evidence in the record showing that the suburban service was an independent service, separate from the system service of the company. Its refusal to consider the evidence tending to show that the revenue derived from the suburban service was insufficient to pay operating expenses and provide a reasonable return on the investment, constituted a denial of due process.

One of the leading cases on this subject is *Northern Pacific Railway Co.* v. *North Dakota*, 236 U. S. 585, 59 L. ed. 735. In that case the State of North Dakota had established maximum intrastate rates for the transportation of car-lot shipments of coal. It was there said: "But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently, attacks upon State rates have raised the question as to the profitableness of the entire intrastate business under the State's requirements. But the decisions in this class of cases furnish no ground for saying that the State may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate. * * * The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for

its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

In *Norfolk and Western Railway Co.* v. *Conley*, 236 U. S. 605, 59 L. ed. 745, it was said: "* * * the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal. The considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and, of necessity, its own rates. In making a reasonable adjustment of the carrier's charges, the state is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."

In *Banton v. Belt Line Railway Corp.*, 268 U. S. 413, 45 S. Ct. 534, the question of separate classes of traffic of the same general character was also involved. It was there said: "There is involved only the rates applicable to a part of the company's business. In this respect, the case is similar to *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 35 S. Ct. 429, 59 L. ed. 755, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1, *Norfolk and Western Railway v. West Virginia*, 236 U. S. 605, 35 S. Ct. 437, 59 L. ed. 745, and *Northern Pacific Railway v. Department of Public Works of Washington*, 268 U. S. 59, 45 S. Ct. 412, 69 L. ed. 836, decided April 13, 1925. The applicable law is plain. The state is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper cost. And such cost includes not

only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part. The cost of doing such business is not, and properly cannot be, limited to the amount by which total operating expenses would be diminished by the elimination of, or increased by adding, the transfer passengers in question. It would be arbitrary and unjust to charge to that class of business only the amount by which the operating expenses were, or would be, increased by adding that to the other traffic carried. Outlays are none the less a-tributable to transfer passengers because also applicable to other traffic. Operating expenses which are incurred on account of all passengers carried, and which are not capable of direct allocation to any class, should be attributed to the transfer passengers in question in like proportion as such expenses are fairly chargeable to other passengers receiving like service. While the carrier has no constitutional right to the same rate or percentage of return on all its business, the state may not select any class of traffic for arbitrary control and regulation."

In *Chicago, Milwaukee and St. Paul Railway Co.* v. *Public Utilities Com.*, 274 U. S. 344, 47 S. Ct. 604, the court considered the validity of an order of the Idaho commission affecting intrastate rates for the transportation of logs. There the State commission took the position that even if it be conceded that the particular rates involved were insufficient to produce a return on the invested capital, it did not necessarily follow that the rates would be confiscatory for the reason that the hauling of logs from the forest to the mill consituted only one step in the process of reducing the logs to the finished product. It further found that the revenues derived from the shipment of logs was only an incident to the traffic and could not be considered as an independent service, but only in connection with the entire revenues earned in the transportation of logs and lumber. The court, however, in refusing to accept this theory said: "The evidence introduced by the carriers was sufficient to warrant, if not to require, a finding that, as to the lines of all petitioners, the intrastate log rates in question are very low in comparison with the rates on other commodities, and

hat, as to the Chicago, Milwaukee & St. Paul and the Great Northern, they are confiscatory. But, as appears from their opinions, the respondent and the court refused to consider nd give weight to that evidence because, as they held, the ntrastate log rates were not to be dealt with separately but ere to be considered in connection with the interstate mber rates, and because the carriers made no showing as o the gains or losses resulting from the interstate transortation. That cannot be sustained. The carriers cannot aintain interstate lumber rates higher than otherwise stified by showing that they suffer loss or have inadequate eturns from the intrastate transportation of logs. The tate has no power to require petitioners to haul the logs t a loss, or without compensation that is reasonable and st, even if they receive adequate revenues from the inrastate log haul and the interstate lumber haul taken ogether. *Northern Pacific Railway Co.* v. *North Dakota*, 36 U. S. 585, 595, 596, 35 S. Ct. 429, 59 L. ed. 735, L. R. A. 917F, 1148, Ann. Cas. 1916A, 1; *Norfolk and Western Railay* v. *Conley*, 236 U. S. 605, 609, 35 S. Ct. 437, 59 L. ed. 745; *Brooks-Scanlon Co.* v. *Railroad Com.*, 251 U. S. 396, 399, 40 . Ct. 183, 64 L. ed. 323; *Northern Pacific* v. *Dept. Public Works*, 268 U. S. 39, 43, 45 S. Ct. 412, 69 L. ed. 836; *Banton Belt Line Railroad Corp.*, 268 U. S. 413, 421, 45 S. Ct. 534, 9 L. ed. 1020."

In the case of *Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 19, the court considered a statute of the State of Neraska, fixing rates for intrastate transportation within ie State. It was here said: "In our judgment, it must e held that the reasonableness or unreasonableness of ates prescribed by a state for the transportation of perons and property wholly within its limits must be deterined without reference to the interstate business done by ie carrier, or to the profits derived from it. The state nnot justify unreasonably low rates for domestic transortation, considered alone, upon the ground that the carer is earning large profits on its interstate business, over hich, so far as rates are concerned, the state has no conol. Nor can the carrier justify unreasonably high rates domestic business upon the ground that it will be able ly in that way to meet losses on its interstate business.

So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect to domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for out of, a common fund; and that its capitalization is on its entire line, within and without the state,—can have no application where the state is without authority over rates on its entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

It is true, as asserted by appellant, the court in the recent cases of *Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U. S. 575, 62 S. Ct. 736, and *Federal Power Com.* v. *Hope Natural Gas Co.* (decided January 3, 1944,) 64 S. Ct. 281, departed somewhat from some of the principles announced in *Smyth* v. *Ames*, relative to the selection of formulas for valuation purposes. It did not, however, depart from the decision with reference to the principle of the segregation of the particular class of service involved from other services rendered by a carrier for rate-making puposes.

From the foregoing cases, it is apparent that the commission in this case disregarded a fundamental rule of law, applicable to the questions before it. It further appears that the order of the commission was based upon this misapprehension of that principle of law which was binding upon the commission. As a result, the commission wrongfully refused to consider the evidence showing that the service rendered by appellee, in its suburban service, was segregated and separate from its system service. Its finding on which its order was based, that the suburban service constituted an integral and inseparable part of the service rendered by the entire system, has no substan-

tial basis in the evidence. Its finding that so long as appellee's net revenues from the operation of its entire system were sufficient to provide a reasonable return on its system investment it was immaterial whether the revenue derived from its suburban service was sufficient to pay operating expenses incurred in that service or a fair return on the reasonable value of the property devoted to that service, was against the manifest weight of the evidence. Having proceeded upon this fundamentally erroneous basis, it logically reached the erroneous conclusion that it could not consider an increase in rates for appellee's suburban service so long as the net revenue from the entire system was sufficient to show that the whole system was not operating at a loss. This conclusion makes it unnecessary for us to consider any other questions presented which have not already been disposed of by this opinion.

The commission having disregarded the evidence in the record, as well as the basic and fundamental rules of law applicable to the facts before it, its order cannot be sustained. The order of the commission has no substantial basis in the evidence. It is unreasonable and unlawful. The judgment of the superior court of Cook county is affirmed.

Judgment affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 858

ILLINOIS COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM SUPREME COURT OF ILLINOIS. No. 27768.

APPELLANTS' REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

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WILLIAM C. WINES,
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THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO 56

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The appellee or appellees in each of the five cases, respectively, now docketed in this court under Nos. 858 to 862, inclusive, the titles of such cases being set forth in the margin,* have filed statements in opposition to this court's

* No. 858—*Illinois Commerce Commission, et al.* v. *Illinois Central Railroad Co.*

No. 859—*Illinois Commerce Commission* v. *Joseph B. Fleming and Aaron Colnon, trustee of Chicago, Rock Island and Pacific Rwy. Co.*

No. 860—*Illinois Commerce Commission* v. *Chicago, Burlington & Quincy Railroad Co.*

No. 861—*Illinois Commerce Commission* v. *Henry A. Scandrett, et al., trustees of property of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*

No. 862—*Illinois Commerce Commission* v. *A. A. Sprague and Bernard J. Fallon, as receivers of Chicago North Shore and Milwaukee Railroad Co.*

jurisdiction. Since these statements, although cast in slightly variant form, all suggest substantially similar arguments, this reply, though copies of it will be printed and filed under each of the five numbers and titles, respectively, will be identical in all of the five cases.

Appellees' suggestions in opposition to this court's jurisdiction are premised upon certain basic fallacies and reflect serious misconceptions of appellants' contentions. In our earnest view, these fallacies and misconceptions can be briefly pointed out.

The Issues Raised by the Emergency Price Control Act.

In appellants' original statement in support of jurisdiction, it was clearly indicated that the Illinois Commerce Commission and the Attorney General of Illinois, differing with appellees and with the Supreme Court of Illinois, conceived the import of the Emergency Price Control Act to be such as to assert congressional occupation of the field of price fixing in general, but to allow state and federal regulatory commissions to retain their ordinary jurisdiction over public utility rates, subject to the condition, which condition has the force of a jurisdictional prerequisite, that the Price Administrator be given *timely* notice of an intention to increase public utility rates and that the utilities consent to his *timely* intervention. It was further indicated that in our view, which view differs from that of the Supreme Court of Illinois and of appellees, the Illinois Commission as a result of this federal act, had at least the right, which it claimed, if not, indeed, the absolute duty, to ascertain, by matter apparent of record before the Commission and not otherwise, that a utility seeking a price increase had complied with this condition prerequisite to the Commission's jurisdiction.

Appellees dispute this construction of the law. We do

not deem this reply to be an appropriate means of debating the merits of the question raised by the conflict between appellants' reading and the Illinois Supreme Court's reading of the act in question. We think it sufficient to say that, upon the question whether the issue is substantial, as distinct from a consideration of the merits of the issue, this case is remarkably like the *Terminal Railroad Association* v. *Brotherhood of Railway Trainmen and Illinois Commerce Commission*, judgment affirmed, 318 U. S. 1, in which a railroad asserted that the Illinois Public Utilities Act, if construed to support an order relative to cabooses in interstate commerce, would bring that act in conflict with the Railway Labor Act, as well as with the Boiler Inspection Act, the Safety Appliance Act and the Interstate Commerce Act. This court regarded these contentions as conferring jurisdiction, though upon the merits the Illinois Supreme Court was affirmed.

But appellees, in addition to disputing appellants' construction of the Emergency Price Control Act, make the further assertion, which is very misleading unless properly understood, that the act was complied with. This contention is subject to two independent replies.

First: It does not appear, either of record in the proceedings before the Illinois Commission or otherwise, nor do appellees contend that they gave the notice in question **prior to the Illinois Commission's order permanently suspending the rates**. Moreover, they make the point, which we deem to verge upon absurdity, that the fact that the Price Administrator did not appear in the proceedings **in the courts on appeal** from the Commission's order is of some significance. Of course, the whole purpose of giving notice is to permit the United States Government, through the Director of Economic Stabilization or the Price Administrator, to present not only argument but **evidence** before the

Illinois Commission. When a record is closed and the evidence is in, there is little point in the United States Government's merely sending a lawyer into a courtroom to make arguments on a record already completed when the Commission will be represented by its own counsel.

If we are correct in our contention that *timely* notice to the United States Government was a prerequisite to the Commission's jurisdiction, it is no answer to say that, after the record was closed, such notice was given. Such notice would not be timely, nor would it subserve the purpose of the act, nor would it amount to compliance with a jurisdictional prerequisite. Summons after judgment, or notice after final decision, when it is too late to offer proof, can hardly be called jurisdictional notification.

Second: Appellees failed to make the fact of notice apparent upon the record of the Commission. It is quite true that the act contains no language requiring the public utility to make such notice apparent. But we apprehend that when a statute requires notice to be given as a prerequisite to the exercise of jurisdiction by a court or other tribunal, such court or other tribunal has at least the right, if not the duty, to take cognizance of a litigant's or a petitioner's failure to make an affirmative showing that jurisdictional prerequisites have been complied with.

One other observation is most important. Appellees make the highly sophistical argument that since the Commission in effect denied the increase, not only for want of jurisdiction but upon the merits, it gave the United States Government every substantial benefit that the Government could have had if it appeared. But appellees also complain of lack of evidence to support the Commission's order. A few words will suffice to convict the appellees of an egregious fallacy and self-contradiction in this position.

Appellees rely upon the Commission's denial of an in-

crease in order to argue that it would have been of no benefit to the Price Administrator to appear in a proceeding in which, even without his appearance, no increase was granted. But at the same time, they complain that the order denying the increase is invalid for lack of evidence. Now, if, as we contend, the purpose of the Emergency Price Control Act was to permit the Director of Economic Stabilization or the Price Administrator not only to appear but to intervene and offer evidence, and if it is likewise true as appellants contend, that no evidence militating against the increase was offered in his absence, then it can not be said that an order which appellees denounce as invalid for lack of evidence protects the federal government's policy, when it might very well have been that the federal government would have offered the very evidence of the absence of which appellees complain if notice had been given.

The simple truth is that appellees deliberately disregarded the command that, before they might increase their fares, they give notice to the United States government of the proceedings. The question whether this failure to give notice vitiated the proceedings is certainly substantial.

We therefore submit that the question whether Emergency Price Control Act justified the Illinois Commission in refusing the increases here involved is substantial and should be passed upon by this court.

Appellees' Fallacies With Respect to the Due Process Question.

Again let us say that we do not conceive it to be the proper office of this reply to debate the merits of the important questions which we seek to present and argue if jurisdiction is void. However, insofar as appellees'

assertions with respect to the due process question are addressed to this court's jurisdiction, as distinct from a consideration of the merits of the due process issue, we consider it proper to make the following brief observations:

In appellants' original statement in support of jurisdiction, it was made clear that we contended that appellees' evidence, although voluminous, was insufficient to support the increase sought in these proceedings because it failed to give the Commission any basis for those findings that appellees in fact sustained any loss or earned less than an adequate return.

We relied upon the principles that both findings and evidence in support of findings of material facts are required by the due process clause.

If appellants are correct in this contention, it would obviously make no difference whether, in writing their order, they indulged in speculation, treated the hearsay literature of economic records as evidence, or otherwise acted improvidently or wrongfully. **The fact would still remain that the carriers had sought an increase in rates without any adequate showing in support of such increase.** In short, the case would be in a posture like that of a case where a trial court has improperly received hearsay evidence for the defendant, misconceived the law, and otherwise erred in denying plaintiff relief but, where, nevertheless, the plaintiff has offered no competent evidence in support of his case. A judgment adverse to the plaintiff in such a case would be affirmed, even though highly improper evidence was received for the defendant.

Appellees advance another sophistry. They argue that the Illinois Commerce Commission has no standing in this court to assail a judgment on the ground that it denies to the public of Illinois due process of law.

Thus there cannot possibly be any merit in appellees' suggestion that the Illinois Commission decided the case on an adequate non-federal ground; for if there was no evidence to justify the increase, the carriers were not entitled to a reversal even though the commission may have erred fundamentally in its rulings and findings. If, as we say, to grant the carriers an increase would deny due process of law when they failed to show any loss, then to reverse an order denying such increase is *per se* unconstitutional no matter how egregious may have been the fallacies embodied in the Commission's orders.

There are two independent answers to this contention. In the *first* place, under both the Illinois and the federal law, the Attorney General (or other counsel for the public) may properly represent the public in a case affecting utilities' rates or services.

In the *second* place, appellees' argument involves the confusion, which is by no means uncommon, between two premises or propositions, one of which premises is unquestionably the law, while the other premise, though frequently asserted, is not and never has been the law.

It is unquestionably the law that only one affected by an unconstitutional statute may challenge its constitutionality. But it is *not* the law, and it never has been the law, that in order to challenge the constitutionality of a statute, the person "affected", if he is in fact "affected", must be the *person whom the unconstitutional features of the statute injure*. If a law or administrative ruling is unconstitutional as a whole, even if it is unconstitutional only because it injures one particular class, then any person, even though he be not a member of that class, may take advantage of the fact that an unconstitutional act is no act at all.

In the instant case, if we are correct in our contention

that the Illinois court required the Illinois Commission to do an unconstitutional act, namely, unconstitutionally injure the public, then certainly the Commission, every member of which is subject to the Constitution of the United States, may invoke the judgment of this court on appeal from such a decision.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 858

ILLINOIS COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OPPOSING JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 858

ILLINOIS COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee

APPEAL FROM SUPREME COURT OF ILLINOIS

STATEMENT OF APPELLEE AGAINST THE APPELLANTS' ASSERTED JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Appellee, Illinois Central Railroad Company, presents this statement to disclose matters and grounds making against the jurisdiction of the Supreme Court of the United States. As will appear, there are no substantial federal questions presented.

I. Notice As Required by the Emergency Price Control Act Was in Fact Given in This Particular Case

On February 6, 1942, the Illinois Central Railroad Company filed with the Illinois Commerce Commission two tariffs in which it proposed to change fares for commutation tickets applicable to Illinois intrastate traffic. It was proposed that such changes become effective March 8, 1942.

On February 18, 1942, the Commission entered an order suspending the proposed changes for investigation. The appellee made effective on March 8, 1942, one of the tariffs containing approximately 80 per cent of the changes proposed under the claimed protection of a decree of a three-judge federal court in the District Court of the United States, Northern District of Illinois, Eastern Division, dated January 7, 1928, as the proposed changes did not exceed the level of rates permitted to be maintained by the railroad in that injunction proceeding. These rates became effective approximately eight months before any notice was required by the Emergency Price Control Act.

Hearings on the suspension order were held by the Commission and the record marked "Heard and Taken" on May 16, 1942. Thus the record was closed five months before the Emergency Price Control Act requiring notice was enacted.

The Commission on June 3, 1942, resuspended the tariffs until January 6, 1943, apparently requiring additional time to decide the case, although the only testimony and exhibits offered were those presented by appellee.

The Emergency Price Control Act, as amended, was approved on October 2, 1942. As applied to common carriers, the only provision in the Act reads as follows:

> "• • • *Provided*, that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase." •

• It will be noted the Act does not require notice to anyone except the President, or such agency as he may designate.

On December 1, 1942, the Commission served on appellee its order dated November 24, 1942. By this order the Commission reaffirmed its suspension of the increase in fares. The finding portion of the Commission's order reads as follows:

"After consideration of the petition, together with all the evidence presented by the parties, both oral and documentary, and after giving careful consideration to all the questions raised in oral argument, and being fully advised in the premises, the Commission concludes and is of the opinion and so finds:

"(1) that the Commission has jurisdiction of the subject matter of this cause and of the parties hereto;

"(2) that the rates involved herein and in effect on March 7, 1942 are just and reasonable;

"(3) that the proposed rates are unjust and unreasonable and in violation of the Public Utilities Act of the State of Illiinos;

"(4) that Supplement No. 7 to Illinois Central Railroad Company Passenger Tariffs Ill. C. C. No. 3755 and Ill. C. C. No. 4258 and 4259 are not just and reasonable and should be denied, and that the schedule of rates, rules and regulations of the Petitioner on file with this Commission and in force and effect on March 7, 1942 should be continued in effect until the further order of this Commission;

"(5) that the Petitioner, Illinois Central Railroad Company, should publish, post and file with this Commission, on not less than one day's notice, effective on or before December 30, 1942, appropriate supplements cancelling Supplement No. 7 to Illinois Central Railroad Company Tariffs Ill. C. C. No. 3755 and Ill. C. C. Nos. 4258 and 4259; and

"(6) that all motions made in this cause by any of the parties hereto that remain undisposed of should be disposed of consistently with the ultimate conclusions contained herein."

A petition for rehearing was forwarded by appellee to the Commission on December 21, 1942. On the same date appellee served on the Office of Price Administration the following notice:

"Chicago, December 21, 1942.

"Price Administrator,
Office of Price Administration,
Washington, D. C.

"DEAR SIR:

"In Ex Parte 148 the Interstate Commerce Commission entered an order dated January 21, 1941, authorizing the railroads of the United States to increase passenger fares 10%. The order of the Interstate Commerce Commission permitted the Illinois Central Railroad Company to increase all its passenger fares except commutation fares. However, approximately 80% of the commutation fares of the Illinois Central were increased, effective March 8, 1942 under the protection of an injunction of the District Court of the United States, Northern District of Illinois, Eastern Division, dated January 7, 1928. About 20% of the commutation tariffs did not fall within the protection of the Federal injunction, and therefore, on February 6, 1942, the Illinois Central filed with the Illinois Commerce Commission tariffs for the 10% increase in such fares. The record in this proceeding was marked 'Heard and Taken on May 16, 1942.' We did not receive an order from the Illinois Commerce Commission until November 24, 1942. In this order the Illinois Commerce Commission denied the proposed increases and ordered suspension of all tariffs, effective December 30, 1942.

"Although we do not believe the Act of Congress entitled 'An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes', approved on the 2nd day of October, 1942, Executive Order No. 9250, and Order

No. 1 issued by the Director of Economic Stabilization on October 14, 1942, apply to this particular case, we have concluded to give notice that we have filed today a petition for rehearing with the Illinois Commerce Commission, and if denied, we will seek by any and all legal proceedings to secure the 10% increase in commutation fares to conform with the 10% increase authorized by the Interstate Commerce Commission in Ex parte 148. The Illinois Central hereby consents to the timely intervention by the Price Administrator of the Office of Price Administration in said proceeding or before any state or federal authority having jurisdiction to consider such increases.

"There is attached hereto a copy of the tariff showing the rates involved. The old rates are 10% under the rates shown.

"Very truly yours,

/s/ JOSEPH H. WRIGHT,
General Attorney."

The Office of Price Administration did not take any steps to intervene in the proceeding before the Illinois Commerce Commission. Specific provisions of the Illinois Public Utilities Act empower the Commission at any time to rescind, alter or amend any order made by it. Also, it has the power to grant rehearings. (Illinois Public Utilities Act, Sec. 67, Ill. Rev. Stat. 1943, Ch. 111-2/3, Par. 71.)

On January 22, 1943, the Commission served notice on appellee that its petition for rehearing was denied in conference on January 12, 1943.

The other 20 per cent of the changes in fares became effective on January 25, 1943, more than 30 days after notice to the Office of Price Administration, under the protection of injunction issued by the Superior Court of Cook County,

Illinois, in Docket No. 42 S 17985 dated December 30, 1942. It reads as follows:

"IN THE SUPERIOR COURT OF COOK COUNTY
STATE OF ILLINOIS

ORDER

42S 17985

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION, et al., Defendants

"This cause coming on to be heard this day on plaintiff's motion for a temporary injunction on plaintiff's verified complaint and the court having heard arguments of counsel and upon consideration of the motion, it was ordered, adjudged and decreed as follows:

"That defendants and each of them, their attorneys, agents, and representatives, and all other persons whatsoever, be temporarily and until the further orders of this court, restrained and enjoined from taking any steps whatever to interfere with the plaintiff in charging and collecting for commutation service, in Cook County, Illinois, the rates and fares provided for in Supplement No. 7 to Tariff Ill. C. C. No. 3755 and Tariffs Ill. C. C. Nos. 4258 and 4259, heretofore filed by plaintiff with the Illinois Commerce Commission; or from instituting any suits or actions to enforce insofar as plaintiff is concerned, the order of the said Illinois Commerce Commission entered on November 24, 1942 in Ill C. C. Docket No. 30476, or from taking any steps or instituting any proceedings to impose fines upon or recover penalties from plaintiff because of plaintiff's action in charging and collecting the aforesaid rates and fares.

"It is further ordered, adjudged and decreed that plaintiff provide each purchaser of a commutation ticket a receipt to identify the purchase until the further order of this court and that notice and receipt show that such receipt may be valuable in the event of refund; the notice shall be prominently posted at each of the plaintiff's stations.

"It is further ordered, adjudged and decreed that plaintiff, until the further order of this court, on or before the 10th day of each month following the order herein, pay unto Henry L. Sonnenschein, as Clerk of the Superior Court of Cook County, Illinois, as Trustee, all sums of money which it may collect from any and all persons in excess of the sum such persons would have been compelled to pay if the order of the Commission dated November 24, 1942 had not been enjoined herein. The said sum shall remain impounded until the further order of this court.

"(S.) JOHN F. BOLTON
Judge.

Ordered this 30th day of December, 1942."

In this proceeding the Illinois Commerce Commission and the Office of Price Administration participated, the latter only as amicus curiae. Neither took an appeal from the above order

Statutory appeal was taken from the order of the Commission to the Superior Court of Cook County, Illinois. In this proceeding the Illinois Commerce Commission and the Office of Price Administration actively participated, the latter only as amicus curiae. The court on July 13, 1943, entered the following order:

"IN THE SUPERIOR COURT OF COOK COUNTY
STATE OF ILLINOIS

No. 43 S 869

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION and JOHN D. BIGGS, WILLIAM PARRILLO, FRANK PESKA, EDWIN A. ROSENSTONE and VAL J. WASHINGTON, as Members of and Constituting the Illinois Commerce Commission of the State of Illinois; and GEORGE F. BARRETT, as Attorney General of the State of Illinois, Defendants.

"The appeal in the above entitled cause having come on for hearing on the record before the Illinois Com-

merce Commission in its Docket No. 30476, as certified to by said Illinois Commerce Commission, and it appearing to the Court that it has jurisdiction of the parties hereto and of the subject matter, and the Court having considered the facts appearing in the evidence as shown by the said record, and having heard the arguments and examined the briefs of counsel, and being fully advised in the premises,

"Finds that the order of said Illinois Commerce Commission, in the said cause, of November 24, 1942, is unreasonable and unlawful for the following reasons: That insufficient findings were made; that the order has no substantial foundation in the evidence; that the said Illinois Commerce Commission in making said order exceeded its power; and that the order is contrary to law.

"It Is Therefore Ordered, Adjudged and Decreed that said order of the Illinois Commerce Commission entered by the said Commission on November 24, 1942, in said cause, known as 'In the matter of the proposed changes in commutation fares, applicable to Illinois intrastate traffic, stated in Supplement No. 7 to Tariff Ill. C. C. No. 3755, and Tariffs Ill. C. C. Nos. 4258 and 4259 of the Illinois Central Railroad Company,' in Docket No. 30476 before the said Illinois Commerce Commission, be and it is hereby set aside.

"It Is Further Ordered, Adjudged and Decreed that all parties hereto are herewith directed to comply with the order and decree of this Court, and to do all things necessary to give it effect immediately.

"Enter:

PETER H. SCHWABA
Judge.

Dated July 13, 1943."

From this order the Illinois Commerce Commission took an appeal to the Supreme Court of Illinois. The Office of Price Administration did not make an effort to appeal. The arguments on appeal in the Supreme Court of Illinois were heard March 21, 1944. The Office of Price Administration

did not either submit briefs or seek to present oral argument as an intervening party or amicus curiae prior to or at that time.

The Office of Price Administration, by letter dated March 25, 1944, advised appellee of its intention to ask leave of the Supreme Court of Illinois to file brief as amicus curiae. The motion was submitted by the clerk to the court on May 8, 1944. It was denied on May 9, 1944.

The opinion of the court was entered on May 16, 1944. Notice of intention to file petition for rehearing was served by the Illinois Commerce Commission on May 23, 1944. The petition for rehearing was filed on June 10, 1944. The Office of Price Administration by letter dated August 31, 1944, or nearly three months later, advised it was presenting motion for leave to file brief as amicus curiae in support of appellant's petition for rehearing. This motion was presented to the court on September 11, 1944. It was denied on September 18, 1944. On the same day the Illinois Commerce Commission petition for rehearing was denied.

As far as the Emergency Price Control Act is concerned, the application of the Illinois Public Utilities Act by the Supreme Court of Illinois does not present in this case any conflict between the state and the federal act, and did not draw into question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States or laws of the United States. The proposed change in rates was initiated almost eight months before the Emergency Price Control Act was amended. Hearings before the Illinois Commerce Commission were concluded approximately five months before the amendment, and before the statutory procedure terminated before the Illinois Commerce Commission the Office of Price Administration was given full notice of the proceedings.

The record will show that notwithstanding receipt of said notice, the Office of Price Administration did not intervene, or seek to intervene, in the proceedings before the Illinois Commerce Commission. It did appear in the Superior Court of Cook County to resist the issuance of an injunction and to sustain the order of the Illinois Commerce Commission, not as an intervening party, but as amicus curiae. In two instances while this case was pending in the Supreme Court of Illinois, the Office of Price Administration waited until just a few days before the court entered its opinion and acted on the Illinois Commerce Commission petition for rehearing before asking leave to file briefs as amicus curiae.

It is respectfully submitted that the procedure followed did not draw into question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution and laws of the United States.

II. The Decision of the Supreme Court of Illinois Cannot Be Said to Deprive the Carrier's Passengers of Property Without Due Process of Law.

In this case, the Illinois Commerce Commission states it is presenting for the first time the contention that where a carrier allegedly fails to present substantial evidence justifying an increase, to set at naught an order denying such an increase is to impose upon the carrier's patrons a confiscatory high rate. No such claim is made by any party whose property is claimed to be confiscated. The claim is obviously an afterthought, not made by anyone who has been deprived of any property, and is entirely frivolous.

In effect, the contention is that the courts of Illinois, and particularly the Supreme Court, by permitting the increase in rates, are depriving the citizens of Illinois of

their property without due process of law in violation of the Constitution of the United States. In this particular proceeding the Attorney General represents the Illinois Commerce Commission pursuant to statutory authorization. Section 72a, Chapter 111-2/3, Ill. Rev. Stat. 1943, reads as follows:

> "In all appeals from the orders and decisions of the Commission, it shall be the duty of the Attorney General to represent the Commission and defend its orders and decisions."

The Illinois Commerce Commission cannot claim to be the injured party, the contention being made for another, i. e., in behalf of the citizens of Illinois. In the case of *Premier-Pabst Co.* v. *Grosscup,* 298 U. S. 226, the court stated at page 227:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him. * * *"

The citizen has his remedy at law under the Public Utilities Act. Section 76, Chapter 111-2/3, Ill. Rev. Stat. 1943, provides the procedure for obtaining reparation in the case where a public utility charges an excessive or unjustly discriminatory amount for its services, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

The Illinois Commerce Commission is in no position to contend that under the Constitution of the United States property is being taken in violation of the Fourteenth Amendment. This amendment provides:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law."

The Fourteenth Amendment does not apply to the case at bar. The State is not depriving any person of its property. The amendment does not affect the rights of one citizen against another, but simply furnishes a guarantee against any encroachment by the State on the fundamental rights which belong to every citizen. *United States* v. *Cruikshank*, La., 92 U. S. 542, 554, 555.

Furthermore, it cannot be contended there is a taking of property without due process of law. The judicial proceedings under which appellee put the increase into effect were in accordance with those rules and proceedings which had been established in our system of jurisprudence for the protection and enforcement of private rights. *Endicott-Johnson Corp.* v. *Encyclopedia Press*, 266 U. S. 285, 288. Due process was observed throughout the judicial proceedings in the Superior Court of Cook County and in the Supreme Court of Illinois. Therefore, even if the Fourteenth Amendment were applicable in this case, the Attorney General is in no position to contend due process was not observed.

In any event, the contention of confiscation without due process is advanced in the face of the fact that the only testimony and exhibits introduced were those offered by appellee. This evidence shows appellee operates an electric suburban service distinct and separate, except in some minor respects, from steam operations conducted for the transportation of freight and passengers, both intrastate and interstate. Separate shop facilities, tracks, equipment and operating employes are exclusively engaged in appellee's electrified suburban service. The valuation evidence produced by witnesses for appellee shows the values of properties devoted to suburban operations. These values were shown to represent prudent investment or sound original cost depreciated. The valuation data was pre-

pared in accordance with concepts and formulas prescribed and recognized by the Interstate Commerce Commission.

The Supreme Court of Illinois definitely recognized the electrified suburban service as a branch of service separate and distinct from steam operations. This was in keeping with a long line of decisions by the Supreme Court of the United States.

Pennsylvania R. R. Co. v. *Towers,* 245 U. S. 6, 11-12.

People ex rel. N. Y., N. H. & H. R. R. Co. v. *Public Service Commission,* 145 N. Y. S. 503, 505.

Norfolk & Western Ry. Co. v. *West Virginia,* 236 U. S. 605, 614.

Northern Pacific Ry. v. *North Dakota,* 236 U. S. 585, 609.

Banton v. *Belt Line Ry.,* 268 U. S. 413, 421, 425.

C. M. & St. P. Ry. Co. v. *Public Utilities Commission of the State of Idaho,* 274 U. S. 344, 350-1.

Smyth v. *Ames,* 169 U. S. 466.

Norfolk & Western Ry. Co. v. *Conley,* 236 U. S. 605.

Northern Pacific Railway v. *Department of Public Works of Washington,* 268 U. S. 39.

Brooks-Scanlon Company v. *Railroad Commission of Louisiana,* 251 U. S. 396.

The Commission does not challenge the fundamental principles announced and followed in the cases decided by the Supreme Court of the United States. (Appellant's Statement, p. 12.) It is the Commission's contention it cannot determine whether the carrier is in fact sustaining a loss upon commutation service without a perspective of the entire operations and physical economies of appellee. Although now the Commission says it does not challenge the fundamental principles announced in the above cases, its decision was premised entirely on a challenge of those

principles. The following paragraph appears in the Commission's order:

> "The Commission has hereinabove set forth its opinions and findings to the effect that the services rendered by Petitioner in its suburban service cannot be segregated and treated apart from its system service, but on the contrary constitute an integral part of its system service and should be so considered in determining whether a just return upon investment of the Petitioner's system as a whole is presently accruing. Accordingly, the Commission is of the opinion and so finds that the proposed rates involved herein are and must be held to be unjust and unreasonable." (Abstract, p. 507, filed in the Supreme Court of Illinois.)

The evidence produced by appellee presented a complete and true picture of the properties devoted to suburban service, the valuation of such properties, operating expenses, and revenues. Operating expenses were allocated under accounting rules prescribed by the Interstate Commerce Commission.

The presentation of system revenues, including both freight and passenger, and including revenues derived from both interstate commerce and intrastate commerce in the fourteen states in which appellee operates, would not have any bearing on the issue whether intrastate suburban patrons, by paying the increased fares, were having property taken from them without due process of law. The fact is that each separate service must pay its own way irrespective of loss or revenue on some other branch of service.

The decision of the Supreme Court of Illinois is consistent with the decisions of the Supreme Court of the United States in *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 575, and *Federal Power*

Commission v. *Hope Natural Gas Company*, 320 U. S. 591. All the Supreme Court of Illinois found was that the Illinois Commerce Commission must adhere to the evidence of record rather than to indulge in speculation and assumption based on matters outside the record or on data not related to the particular service under consideration. The Court stated as follows:

> "Evidence was offered on the question of values of property used and useful, in both the suburban and through service, allocating to each its just proportion of property used jointly in both branches of service. Joint expenses were in like manner allocated. The evidence touching the question of the value of the property, used and useful and devoted to the suburban service, tended to show that, under any formula approved by the Supreme Court in Federal Power Com. v. Natural Gas Pipeline Co., 315 U. S. 575, 62 S. Ct. 736, for arriving at such values, the present rates would not produce a fair return on the investment. The commission disregarded this evidence in its entirety."

It cannot be said the decision of the Supreme Court of Illinois had the effect of depriving suburban passengers of property without due process, and the contention of the appellant that a substantial federal question is involved is frivolous.

III. To Give This Court Jurisdiction in This Case, It Must Appear That There Is a Federal Question Involved Which Is Decisive of the Case. If the Decision of the State Court Rests Upon a Non-Federal Ground, Which Independently and Adequately Supports the State Court's Judgment, This Court Will Not Exercise Jurisdiction.

It seems scarcely necessary to cite authorities in support of the above rule followed by the Supreme Court of the United States. A few cases in point are:

Lynch v. *New York,* 293 U. S. 52, 79 L. Ed. 191;
Honeyman v. *Hanan,* 300 U. S. 14, 81 L. Ed. 476;
Kalb v. *Feuerstein,* 308 U. S. 433, 84 L. Ed. 370.

In *Lynch* v. *New York,* 293 U. S. 52, the court stated at pages 54-55:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U. S. 216, 234; Johnson v. Risk, 137 U. S. 300, 306, 307; Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293, 295, 297; Eustis v. Bolles, 150 U. S. 361, 366, 367; Whitney v. California, 274 U. S. 357, 360, 361; Mellon v. O'Neil, 275 U. S. 212, 214, Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguim-

bau, 198 U. S. 149, 154, 155; Johnson v. Risk, supra; Wood Mowing & Reaping Machine Co. v. Skinner, supra; Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U. S. 596, 599; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 302, 304."

The decision of the Supreme Court of Illinois sustained an order of the Superior Court of Cook County, which

> "Finds that the order of said Illinois Commerce Commission, in the said cause, of November 24, 1942, is unreasonable and unlawful for the following reasons: That insufficient findings were made; that the order has no substantial foundation in the evidence; that the said Illinois Commerce Commission in making said order exceeded its power; and that the order is contrary to law."

It is clear that appellant, which derives all its powers from the Illinois Public Utilities Act, must, according to the highest court in the State of Illinois, comply with the mandatory provisions of the act under which it is created, and that the action of the Supreme Court of Illinois in applying the provisions of the State act did not base its decision on a federal question, and that its decision rests on procedural and substantive matters sufficient in themselves to sustain the decision, irrespective of the federal questions sought to be presented. The construction of the State statute by the Supreme Court of Illinois is final and not subject to review.

Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835.

Watson v. *Buck*, 313 U. S. 387, 85 L. Ed. 1416.

35 C. J. S., Secs. 170, 171, pp. 1244-1254.

Conclusion

For the reasons aforestated it is submitted that an appeal does not lie from said decision of the Supreme Court of Illinois to this Court.

Respectfully submitted,

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(6182)

No. 858. ILLINOIS COMMERCE COMMISSION ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. Appeal from the Supreme Court of Illinois. February 26, 1945. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *George F. Barrett,* Attorney General, and *William C. Wines,* Assistant Attorney General, for appellants. *Messrs. Vernon W. Foster, Charles A. Helsell* and *Elmer A. Smith* for appellee. Reported below: 387 Ill. 256, 56 N. E. 2d 432.